

14
Office Supreme Court, U. S.

FILED

OCT 4 1915

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 618.

CHARLES M. STRATTON, PLAINTIFF IN ERROR,

vs.

WALKER B. STRATTON.

**MOTIONS TO DISMISS WRIT OF ERROR OR TO
AFFIRM JUDGMENT OR TO TRANSFER TO THE
SUMMARY DOCKET AND FOR DAMAGES.**

**E. E. ERSKINE,
C. A. VAIL, AND
D. A. HOLLINGSWORTH,**
Attorneys for Defendant in Error.

(24,901)



INDEX.

	Page
Appendix	45
Finding of facts and conclusions of law of court of appeals.....	45
Petition for writ of error.....	48
Assignment of errors.....	51
Certificate of clerk of court of appeals.....	53
Opinion of court of appeals.....	54
Constitution of Ohio.....	64
Syllabus of case in 88 Ohio State, 456.....	65
Certificate of clerk of supreme court of Ohio.....	67
Argument	39
Authorities cited.....	1
Facts	35
Motions to dismiss, etc.....	1
Notice of motions.....	3
Pleadings	4
Amended petition	4
Motion to amend petition.....	19
Demurrer to amended petition.....	22
Answer to amended petition.....	23
Reply to answer to amended petition.....	26
Amendment to amended petition.....	26
Answer to amendment to amended petition.....	29
Reply to answer to amendment to amended petition.....	31
Motion for a new trial.....	32
Certificate of clerk of court of appeals.....	34
Points and authorities.....	36
Service of notice acknowledged.....	3

AUTHORITIES CITED.

Albright vs. Teas, 106 U. S., 613.....	37
Allen vs. Arguimbau, 198 U. S., 149.....	38
Brown et al. vs. Piper, 91 U. S., 37.....	38, 44
Capital Nat'l Bank vs. Cadiz First Nat'l Bank, 172 U. S., 425..	38
Carey vs. Houston, 150 U. S., 179.....	45
Dale Tile Mfg. Co. vs. Hyatt, 125 U. S., 46.....	36, 37
Felix vs. Schwarnweber, 125 U. S., 54.....	36
Fisher vs. Perkins, 122 U. S., 523.....	36, 40

	Page
Giles <i>vs.</i> Teasley, 193 U. S., 146.....	38
Great Western Telegraph Co. <i>vs.</i> Burnham, 162 U. S., 339.....	36
Harrison <i>vs.</i> Morton, 171 U. S., 38.....	38
Home for Incurables <i>vs.</i> New York, 187 U. S., 155.....	38
Klinger <i>vs.</i> Missouri, 13 Wall., 263.....	38
McClure <i>vs.</i> Jeffrey, 8 Ind., 79.....	37
Mullen <i>vs.</i> Western Union Beef Co., 173 U. S., 116.....	36
Nye <i>vs.</i> Raymond, 16 Ill., 153.....	37
Penn. Railroad <i>vs.</i> Locomotive Truck Co., 110 U. S., 494.....	38, 44
Pierce <i>vs.</i> Somerset R. Co., 171 U. S., 641.....	38
Pratt <i>vs.</i> Paris Gas Light, etc., Co., 168 U. S., 255.....	37
Rich <i>vs.</i> Atwater, 16 Conn., 400.....	37
Rouch <i>vs.</i> Nevlin, 128 U. S., 579.....	45
Rutland R. Co. <i>vs.</i> Central Vermont R. Co., 159 U. S., 630.....	38
Wade <i>vs.</i> Lawder, 165 U. S., 624.....	37
Walter A. Wood Mowing, etc., Machine Co. <i>vs.</i> Skinner, 139 U. S., 203.....	36
Yazoo, etc., R. Co. <i>vs.</i> Adams, 180 U. S., 41.....	38

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 618.

CHARLES M. STRATTON, PLAINTIFF IN ERROR,

vs.

WALKER B. STRATTON.

IN ERROR TO THE COURT OF APPEALS OF THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO.

**MOTIONS TO DISMISS WRIT OF ERROR OR TO
AFFIRM JUDGMENT OR TO TRANSFER TO THE
SUMMARY DOCKET AND FOR DAMAGES.**

Now comes Walker B. Stratton, the above-named plaintiff, by his counsel appearing in that behalf, and moves this honorable court:

First. To dismiss and quash the paper purporting to be a writ of error herein for want of jurisdiction and because the paper purporting to be a writ of error is informal, irregular,

and insufficient on the grounds stated in the annexed argument and upon other grounds.

Second. To affirm the judgment of the Court of Appeals of the Seventh Appellate District of the State of Ohio, on the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only, and that the questions upon which it is claimed the jurisdiction of this court depend are so frivolous as to need little or no argument, having been repeatedly decided by this court contrary to the contentions of the defendant, Charles M. Stratton.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or to affirm, because the case is of such a character as to not justify extended argument.

Fourth. To assess such damages against the appellant, Charles M. Stratton, in favor of the appellee, Walker B. Stratton, under paragraph two of rule twenty-three of the Rules of the Supreme Court of the United States, as is just and equitable.

E. E. ERSKINE,

C. A. VAIL,

D. A. HOLLINGSWORTH,

Attorneys for Plaintiff, Walker B. Stratton.

NOTICE OF MOTIONS.

Charles M. Stratton is hereby notified that Walker B. Stratton will, on the 25th day of October, A. D. 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record and sections of the Constitution of the State of Ohio, as contained in an appendix thereto, all of which are now served upon you herewith.

E. E. ERSKINE,
C. A. VAIL, AND
D. A. HOLLINGSWORTH,

Attorneys for Plaintiff, Walker B. Stratton.

Copy of the foregoing motions and notice, together with points and authorities, argument, and appendix, received this — day of —, A. D. 1915.

— —,
— —,

Attorneys for Defendant, Charles M. Stratton.

STATE OF OHIO,

County of Jefferson, ss:

Charles A. Vail, being first duly sworn, deposes and says that he, being duly authorized in the premises, did on the second day of October, A. D. 1915, serve a copy of the foregoing motions and notice, together with points and authorities, argument, and appendix hereto attached, on A. C. Lewis, attorney for defendant, Charles M. Stratton, by handing same to him personally, at his office, Steubenville, Ohio.

CHARLES A. VAIL.

Sworn to before me and subscribed in my presence by the said Charles A. Vail this second day of October, A. D. 1915.

[NOTARIAL SEAL.]

W. C. BROWN,

Notary Public.

PLEADINGS.

The pleadings in the case at bar, which make up the issues upon which the case was tried, are as follows:

"WALKER B. STRATTON, Plaintiff,

vs.

*CHARLES M. STRATTON, HARPER E. STRATTON, and THE
STRATTON FIRE CLAY COMPANY, Defendants.*

Amended Petition.

(Filed with Clerk of Courts of Jefferson County, Ohio, January 24, 1914.)

Plaintiff says that The Stratton Fire Clay Company, one of the above-named defendants, is and was a corporation duly organized under the laws of Ohio during all the time of the matters hereinafter complained of, and is and was during said time the owner of three plants for the manufacture of sewer pipes and other clay products at Stratton, Jefferson County, Ohio; that during all of said time Charles M. Stratton was the president of said corporation, and that by and through him as such president the business of said corporation was conducted with the knowledge, acquiescence and consent of all the other officers as well as stockholders of said corporation, including the business matters, and each of them, hereinafter complained of.

Plaintiff says that on the fifth day of April, 1909, defendants, and each of them, were indebted to him upon four certain promissory notes, two of said notes bearing date December 15, 1904, calling for the sum of ten thousand dollars (\$10,000) each, due and payable respectively on the 15th day of December, 1908, and the 15th day of December, 1909, with interest at the rate of six per cent per annum, interest payable semi-annually; one note of six thousand

dollars (\$6,000) of date — — —, due and payable in one year from date, with interest at the rate of six per cent per annum, interest payable semi-annually, and one note of four thousand dollars (\$4,000), due and payable in one year from the date thereof, with interest at the rate of six per cent per annum, interest payable semi-annually.

Plaintiff further says that the said defendant, The Stratton Fire Clay Company, on the 15th day of December, 1904, in order to secure the payment of said two ten thousand dollar notes above described, "executed and delivered to this plaintiff its certain mortgage deed for the following premises:

(Description of real estate.)

That said mortgage contained a provision that if the mortgagor should pay the principal or interest maturing on said notes within thirty (30) days after maturity, then the mortgage was to be void, otherwise to be and remain in full force. That said mortgage deed has become absolute.

Plaintiff further says that for a long time prior to the 5th day of April, 1909, a combination of manufacturers of sewer pipe and other clay products had existed, covering a large portion of the United States, for the purpose of controlling the trade in sewer pipe and other clay products and establishing the price at which sewer pipe and said other clay products should be sold; that said association or company or combination had existed for a number of years prior to said date; that said combination had organized and had its president, vice-president, and secretary during all of said time, as well as its constitution and by-laws to control and govern it in the transaction of its said business.

Plaintiff further says that thereafter—and plaintiff is unable to state the exact date thereof—a suit was brought against said company or association by the Government of the United States in one of the United States courts within

and for the State of New York for the purpose of dissolving said company or association as being and operating and transacting its business in violation of the laws of the United States, said laws being commonly known as the Sherman Anti-trust laws. Plaintiff says that in said cause said company or association was dissolved, and that the said association was restrained and prevented by order and decision of said court from transacting its business under its constitution and by-laws as it had theretofore been doing.

The Stratton Fire Clay Company, defendant herein, had become a member of said association long prior to the institution of said suit and said order and decision of said court.

Plaintiff further says that after the decision in said cause in favor of the Government, as aforesaid, that the manufacturers, and each of them, including the defendant, The Stratton Fire Clay Company, previously transacting business as aforesaid as said association, desiring to be able in some manner to control the trade and fix prices as they had previously done, but in a legal manner, took advice of attorneys upon said subject as to the possibility of fixing prices and agreeing upon the management of the output of their manufacturing establishments without violating said law of the United States commonly known as the Sherman Anti-trust Law as aforesaid.

Plaintiff says that after the expenditure of some fifteen or twenty thousand dollars, as plaintiff is informed and believes and avers, that said members of said former association, including the defendant, The Stratton Fire Clay Company, were advised by their legal counsel that if a patent for the manufacture of sewer pipe could be obtained from the United States Government, and all of said members, including the defendant, The Stratton Fire Clay Company, would enter into a combination to manufacture under the right given by said patent that the product so manufactured by said members under and by virtue of the rights granted by the patent could be sold lawfully at such price as said members might desire to sell the same, and that products so

manufactured and sold at prices so agreed upon would not be a violation of said Sherman Anti-trust Law.

Plaintiff further says that after the dissolving of said association that the former members thereof, including the defendant, The Stratton Fire Clay Company, continued to hold meetings, and came together in the city of New York and other places, and that at said meetings said matter of employing counsel and devising ways and means to legally control the output of said sewer-pipe manufacturers and the price at which such output should be sold, were considered and discussed, and that at said meetings before as well as after the advice of counsel, as aforesaid, said questions were considered and discussed, and that after the advice of counsel so given it was proposed at one of said meetings that a large sum of money be contributed and expended and paid to the inventor of a patent whereby they could legally operate as aforesaid in pursuance of said legal opinion of counsel.

The said defendant, The Stratton Fire Clay Company, was represented by Charles M. Stratton, defendant, as its President at said meetings, held for said purpose, to the knowledge of each and all the officers, directors and stockholders of the said The Stratton Fire Clay Company.

Plaintiff says that after said advice of counsel so obtained by said manufacturers, the said Charles M. Stratton, with a view of meeting the requirements of said legal opinion so that all said manufacturers formerly belonging to said association could legally manufacture and fix prices of sewer pipe, obtained a patent for said purpose from the United States of America on the 12th day of January, 1909, and being the owner of said patent on the fifth day of April, 1909, for the purpose and with the intent to cheat, wrong, and defraud this plaintiff, and for the purpose of inducing plaintiff to surrender to him the promissory notes above described, said Charles M. Stratton wilfully, knowingly, fraudulently, and corruptly, and for the purpose of inducing

this plaintiff to buy said patent from him, represented to this plaintiff that said letters patent were of great value because of said legal opinion to said manufacturers of sewer pipe and of their desire to manufacture and fix prices under the same as aforesaid, and did then not only fraudulently so represent, as hereinbefore set forth, but stated and agreed to and with the said plaintiff that all the members of said dissolved association, including the defendant, The Stratton Fire Clay Company, had agreed to and would enter into an agreement to use said patent right in the manufacture of sewer pipes and pay a large rental or royalty therefor or buy the same at a large price as well as fix the price at which such sewer pipes should be sold. And the said defendant, Charles M. Stratton, did further agree to and with the said plaintiff that he and The Stratton Fire Clay Company would join with what was known as The Eastern Sewer Pipe Manufacturers in an association or combination to manufacture and fix prices of sewer pipe under the said letters patent, and the said Charles M. Stratton did further agree that the said The Eastern Sewer Pipe Manufacturers should have the right to fix prices and to regulate the output of all sewer pipe made under said patent.

Plaintiff says that, relying upon the said representations, statements, promises, and agreements, as aforesaid, made to him by the said Charles M. Stratton, as aforesaid, and believing that the said Charles M. Stratton was acting in good faith in making said representations, on said fifth day of April, 1909, and in consideration of said covenants and agreements so made between plaintiff and the said Charles M. Stratton, he purchased from said Charles M. Stratton said letters patent for the sum of thirty thousand dollars (\$30,000.00), and in payment for the same turned over and transferred to him by written transfer thereof the said promissory notes above described, which notes the said Charles M. Stratton now and ever since has held, and refuses to redeliver the same to this plaintiff or to pay him the respective

amounts now due and owing upon the same. That no payments have been made to the said plaintiff on account of or on said notes since they were transferred and turned over to the said Charles M. Stratton, and that there is now due and unpaid to the said plaintiff from the said defendants the sum of thirty thousand dollars (\$30,000.00), together with the interest thereon from said fifth day of April, 1909.

Plaintiff further says that he and the said Charles M. Stratton and Harper E. Stratton are full brothers; that he and the said Charles M. Stratton, during all the time of the matters hereinbefore complained of, were on very friendly terms as such brothers, and that he did have and reposed great confidence up to said time in his said brother, Charles M. Stratton, and that by reason of said relationship and friendship and confidence in his said brother he relied the more implicitly upon said false representations and was the more readily thereby induced to enter into an agreement for the purchase of said letters patent from him.

Plaintiff avers that said patent right at the time it was so transferred to him was worthless and of no intrinsic value, and that the same was well known to the said Charles M. Stratton, but unknown to the said plaintiff.

About the month of March, 1910, and plaintiff is unable to state the exact date, all of the members of said dissolved association, as aforesaid, except the defendant, The Stratton Fire Clay Company, were ready and willing to enter into an agreement for the use of said letters patent in the manufacture of sewer pipes or buy said letters patent from the said plaintiff and to pay therefor a large royalty per press of sewer pipe manufactured under said letters patent, or to buy said letters patent at an agreed price of thirty-two thousand dollars (\$32,000.00) if the said The Stratton Fire Clay Company would enter into said agreement, which said agreement he (the said Charles M. Stratton) had previously represented he would enter into, as aforesaid, and covenanted and agreed

with this plaintiff to enter into said agreement as an inducement to said purchase of said patent.

Plaintiff says that but for said representations and said agreements, he would not have purchased said letters patent, but plaintiff avers that the said Charles M. Stratton, with the fraudulent intent and purpose of making said letters patent worthless to this plaintiff, and in violation of his said agreement at the time of the purchase of the same by this plaintiff, and in consideration of which agreement said notes were turned over as aforesaid, wholly refused to perform his said representations, and wholly refused to perform his said covenants and agreements, by reason of which said representations and agreements this plaintiff was induced to make said purchase, and wrongfully and fraudulently so refused to carry out his said representations and agreements, and absolutely refused to enter into said agreement with the other manufacturers of sewer pipes, as aforesaid, well knowing by his said refusal and the refusal of the defendant, The Stratton Fire Clay Company, that said letters patent sold by him as aforesaid to this plaintiff were thereby rendered absolutely worthless and of no value whatever to this plaintiff.

Plaintiff further says that at the time he purchased said letters patent from said defendant, Charles M. Stratton, and at the time he delivered to him the promissory notes, as aforesaid, that he (the said Charles M. Stratton) had no intention of carrying out his said representations and covenants and agreements made with this plaintiff, as aforesaid, and whereby the plaintiff was induced to make said purchase as aforesaid.

Plaintiff says that had he known that the said defendants, Charles M. Stratton and The Stratton Fire Clay Company, would have refused to carry out said agreements and false representations whereby he was induced to buy said letters patent, and had known that the false representations of the said Charles M. Stratton that said manufacturers had already agreed to use or buy said letters patent were false and un-

true, that he would not have purchased said letters patent, nor would he have turned over to the said Charles M. Stratton the said promissory notes as above set forth, but relying upon said fraudulent representations, and each of them, of the said Charles M. Stratton, as above set forth, and in consideration of his covenants and agreements, as above set forth, he purchased said letters patent, and delivered to him said promissory notes, as aforesaid.

Plaintiff further says that at the time of the purchase of said letters patent the said Charles M. Stratton formulated a written contract signed by Charles M. Stratton, as well as by this plaintiff, purporting to show the agreement which was had on said occasion as to the transfer of said letters patent, but plaintiff says that by the mistake and oversight of the said plaintiff at the time it was formulated by the said defendant and in the signing of the same as well as by the mistake or fraud of the said Charles M. Stratton, and plaintiff is unable to aver which, said written contract does not state the agreement which was actually made between the said plaintiff and the said defendant as to the transfer of said letters patent. The writing so signed as said agreement is in the words and figures following to wit:

"Article of Agreement.

"This agreement entered into, this, the fifth day of April, A. D. 1909, by and between C. M. Stratton, party of the first part, and W. B. Stratton, party of the second part, witnesseth:

"C. M. Stratton, party of the first part, in consideration of the sum of \$30,000, paid to him in hand by W. B. Stratton, party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey to party of the second part, his letters patent for re-inforced self-centering pipe, serial number 453,600, issued by the Commissioner of Patents, January 12th, 1909, at Washington, D. C. Description and cut of same hereto attached, and made part of this agreement. Letters patent

covering the United States and Territories, with the following reservations and conditions:

"The said party of the first part, reserves the right to manufacture, or cause to be manufactured, the said patent pipe at The Stratton Fire Clay Co.'s plant, The Ohio River Sewer Pipe Co.'s plant, and The Great Northern Sewer Pipe Co.'s plant, or any sewer pipe factories that the Stratton Brothers may erect in the future, without restrictions as to the price that he may desire to sell the goods, or the quantity that he may desire to manufacture.

"The said party of the first part agrees that in case he should dispose of either of the above-named factories, the rights to manufacture the said patent pipe, shall not be included in the sale.

"The said party of the second part agrees that all of the patent pipe manufactured shall be sold under the name of 'The C. M. Stratton Patent.'

"The said party of the first part further agrees to protect the party of the second part, in case of legal proceedings, where outside parties proceed to manufacture the said patent pipe without consent of the said second party. Any amount not to be in excess of \$10,000, to defend the legality of the patent.

"(Signed)

"C. M. STRATTON.

"WALKER B. STRATTON.

"JENNIE McELVAINE."

That the contract and agreement as actually made, and was intended to have been written, should have been in the following words and figures, to wit:

"Article of Agreement.

"This agreement entered into, this, the fifth day of April, A. D. 1909, by and between C. M. Stratton, party of the first part, and W. B. Stratton, party of the second part, witnesseth:

"C. M. Stratton, party of the first part, in consideration of the sum of \$30,000, paid to him in hand by W. B. Stratton, party of the second part, the receipt of which is hereby acknowledged, does hereby

grant, bargain, sell, and convey to party of the second part, his letters patent for reinforced, self-centering pipe, serial number 453,600, issued by the Commissioner of Patents, January 12th, 1909, at Washington, D. C. Description and cut of same hereto attached, and made part of this agreement. Letters patent covering the United States and Territories; and said first party agrees that he and The Stratton Fire Clay Company will join with what is known as The Eastern Sewer Pipe Manufacturers in an association or combination to manufacture and fix prices of sewer pipe under the above-described patent, and he further agrees that The Eastern Sewer Pipe Manufacturers will have the right to fix prices and to regulate the output of all sewer pipe made under said patent, with the following reservations and conditions:

"The said party of the first part, reserves the right to manufacture, or cause to be manufactured, the said patent pipe at The Stratton Fire Clay Co.'s plant, The Ohio River Sewer Pipe Co.'s plant, and The Great Northern Sewer Pipe Co.'s plant, or any sewer pipe factories that the Stratton Brothers may erect in the future, without restrictions as to the price that he may desire to sell the goods, or the quantity that he may desire to manufacture.

"The said party of the first part agrees that in case he should dispose of either of the above-named factories, the rights to manufacture the said patent pipe, shall not be included in the sale.

"The said party of the second part agrees that all of the patent pipe manufactured shall be sold under the name of 'The C. M. Stratton Patent.'

"The said part of the first part further agrees to protect the party of the second part, in case of legal proceedings, where outside parties proceed to manufacture the said patent pipe without consent of the said second party. Any amount not to be in excess of \$10,000, to defend the legality of the patent.

"(Signed)

C. M. STRATTON.

"WALKER B. STRATTON."

"JENNIE McELVAINE."

Plaintiff further says that about or shortly after the time that he was so offered thirty-two thousand dollars (\$32,000) for said letters patent, as aforesaid, and which offer was accepted by the said plaintiff, the said Charles M. Stratton, in violation of his agreement and representations, as aforesaid, having refused to carry out the same by joining in said agreement with said other manufacturers, then and there covenanted and agreed to and with the plaintiff that he would return to the plaintiff the consideration which he had received for the transfer of said letters patent to the plaintiff, to wit, said notes or the sum of thirty thousand dollars (\$30,000), the value of said notes; and that he would sell said letters patent or negotiate with said other manufacturers as to manufacturing under said letters patent for himself and on his own account; and plaintiff says that he agreed to receive the return of said consideration for said letters patent, which he had paid to the said Charles M. Stratton, as aforesaid, for the transfer of the same to him, and that said Charles M. Stratton could sell or negotiate for the use of said letters patent as his property, and that thereupon it was mutually understood and agreed by the plaintiff and the defendant Charles M. Stratton, that the said plaintiff had no further interest in or to said patent, and that the said Charles M. Stratton should be regarded and thereby become himself the owner of said patent with the full right to sell or contract with reference to the same as his own property, although plaintiff says that no written transfer of said letters patent from the plaintiff back to the said Charles M. Stratton was then made or executed, but that it was contemplated and agreed between said parties that the same should be done and said consideration so received by the said Charles M. Stratton from the said plaintiff should be returned to the said plaintiff.

That the relations between the plaintiff and the said defendant Charles M. Stratton were then those of close brotherly friendship, and that plaintiff, as above stated, reposed great confidence in his said brother at said time,

believing that his said parol agreement with him to return the consideration in consideration of a reassignment back to him for the letters patent would be fully and honestly carried out by the said Charles M. Stratton at a subsequent time as might be convenient between them.

And plaintiff says that the said Charles M. Stratton did, in pursuance of said agreement, as plaintiff is informed and believes, contract shortly thereafter to sell said letters patent to one Francis Seiberling, for The United States Investment Company, for the intended use and benefit of said manufacturers, for the sum of thirty-two thousand dollars (\$32,000), and plaintiff says that said contract was made by the said Charles M. Stratton, with plaintiff's knowledge and consent that he should so sell the same as the said Charles M. Stratton well knew, and that the said plaintiff by reason of said agreement with the said Charles M. Stratton ceased all endeavors on his part to negotiate or sell said letters patent, or any rights thereunder, as he would have done but for his said agreement with his said brother, Charles M. Stratton.

Plaintiff says that if said patent had any actual value, which he denies, that it consisted wholly and solely in the possibility that the manufacturers of sewer pipe should thereafter unitedly agree to manufacture under the same, with the legal right to do so without a violation of the Sherman act, as aforesaid.

Plaintiff says that but for the interference of the said Charles M. Stratton and his refusal as aforesaid to carry out the agreement of the said plaintiff with the said manufacturers, as aforesaid, to sell said letters patent at the sum of thirty-two thousand dollars (\$32,000) would have been made, but that he was prevented from making said advantageous sale by the wrongful acts of the said Charles M. Stratton, as aforesaid, and plaintiff was prevented thereafter from the opportunity of making any sale or transfer of said letters patent, or the opportunity to do the same, by reason of the conduct, acts, and agreements of the said Charles M. Stratton to return to plaintiff the consideration he had paid for said

letters patent and to thereafter be regarded as the owner of the same with full power of disposition as aforesaid.

It was agreed at the time of said agreement to return to the said plaintiff the consideration for said letters patent, and that the said Charles M. Stratton was again to become the owner of said letters patent himself; that the said plaintiff would, at any time the said defendant Charles M. Stratton should desire the same, transfer the title to said letters patent back to the said Charles M. Stratton.

Plaintiff says that he has at all times believed until about the time of the bringing of this action that said agreement to rescind said contract would be carried out, and has at all times been ready and willing on his part to carry out said agreement, and believed that the said Charles M. Stratton would honestly carry out said agreement, and relied upon the same, until he refused so to do about the month of January, 1913.

The said plaintiff, about said date last mentioned, desiring to close up said matter, asked the said defendant Charles M. Stratton, to pay to him said thirty thousand dollars (\$30,000) in pursuance of said agreement, and offered to give him a written transfer of the title to said letters patent; when the said Charles M. Stratton refused to pay said thirty thousand dollars (\$30,000), or to receive a written assignment of said letters patent, as aforesaid, but proposed to the said plaintiff that plaintiff give to him sixty days' time to decide whether he might pay to the said plaintiff twenty-five thousand dollars (\$25,000) in full settlement of said thirty thousand dollars, as aforesaid; and plaintiff says that he then assented to said proposition of the said Charles M. Stratton, and did agree to extend to him sixty days' time to consider said matter, and did agree that he would accept said twenty-five thousand dollars (\$25,000) in full settlement of said thirty thousand dollars so agreed to be paid to him by the said Charles M. Stratton, as aforesaid. And plaintiff says that the said Charles M. Stratton then proposed to him to put such agreement in writing, and that in pursuance of said request, and in order to carry out said talked-

of agreement of the settlement and adjustment of said matter, a writing was made between them in the words and figures following:

"Opinion—Sewer-pipe Patent.

"TORONTO, OHIO, January 30th, 1913.

"I, Walker B. Stratton, of the village of Toronto, County of Jefferson and State of Ohio,

"For the sum of \$10.00 payment of same is hereby acknowledged,

"Do hereby grant to C. M. Stratton an option for the period of sixty (60) days to buy a certain letters patent #909,344, and agree to deliver said patent at any time within sixty days from above date on the payment by the said C. M. Stratton of twenty-five thousand (\$25,000.00) dollars.

"(Signed) WALKER B. STRATTON."

"Witness:

"ARTHUR WEMPLE."

Plaintiff further says that the said Charles M. Stratton wholly failed to pay to him said twenty-five thousand dollars (\$25,000.00), or to receive a written transfer of said letters patent in pursuance of said writing, but refused so to do as well as to pay to said plaintiff any portion of said thirty thousand dollars (\$30,000.00) as so agreed to be returned and paid to him.

Plaintiff says that he thereupon returned to the said Charles M. Stratton the said ten dollars (\$10.00) paid him, as shown by the writing of January 30, 1913, as a consideration for the agreement on the plaintiff's part to receive twenty-five thousand dollars (\$25,000.00), instead of said thirty thousand dollars (\$30,000.00), and to make a written transfer of said letters patent.

Plaintiff further says that by decision of a United States court since said patent was so supposed by said manufacturers to be a valuable patent under which they could manufacture sewer pipe and dispose of the same at a fixed price and control the trade, as aforesaid, in pursuance of said legal

opinion, as aforesaid, and since all of the transactions, as aforesaid, that it has become manifest to all said manufacturers of sewer pipe that said legal counsel was ill-advised and not the law, and that by reason thereof said patent was and is utterly worthless and of no value whatsoever. All of which is well known to all of said manufacturers of sewer pipe.

Said patent has never been used by any manufacturer of sewer pipes, or other clay products, and could not be used by any manufacturer of sewer pipe, without loss, and that said patent is not and could not be put to any practical or beneficial use. So that plaintiff says that he has received nothing of any value for said thirty thousand dollars (\$30,000.00) so paid to the said Charles M. Stratton by him as aforesaid.

Wherefore plaintiff prays that the sale and transfer of the letters patent from the defendant Charles M. Stratton to this plaintiff be declared fraudulent and void; that the same may be canceled and held for naught; that the said defendant, Charles M. Stratton, may be ordered and directed to return to plaintiff the four (4) promissory notes above described; that the transfer thereof to Charles M. Stratton may be canceled and held for naught; that the equity of redemption of the defendant The Stratton Fire Clay Company in and to said property above described may be foreclosed; that plaintiff may be awarded judgment against said defendants, and each of them, for the sum of thirty thousand dollars (\$30,000.00), as is evidenced by said four promissory notes with interest at the rate of six per cent per annum, interest payable semi-annually, from the fifth day of April, 1909; that said written contract may be reformed; that any compensation to which the plaintiff may in equity be entitled may be decreed to him, and for such other, further, and different relief as equity and good conscience may require in the premises.

E. E. ERSKINE &

C. A. VAIL,

Attorneys for Plaintiff.

(Jurat duly signed.)

Motion.

(Filed with Clerk of Courts of Jefferson County, Ohio, April 7, 1914.)

The defendants, and each of them, move the court to require plaintiff to amend his amended petition herein in the following particulars, to wit:

1. By separately stating and numbering the several causes of action alleged or attempted to be alleged therein.

2. By striking out the fourth paragraph, the same beginning with the words, "Plaintiff further says that for a long time," and ending with the words, "to control and govern him in the transaction of its said business."

3. By striking out the fifth paragraph, the same beginning with the words, "Plaintiff further says that thereafter," and ending with the words, "as it had theretofore been doing."

4. By striking out the sixth paragraph, the same beginning with the words, "The Stratton Fire Clay Company," and ending with the words, "decision of said court."

5. By striking out the seventh paragraph, the same beginning with the words, "Plaintiff further says that after the decision in said cause," and ending with the words, "the Sherman Anti-trust law, as aforesaid."

6. By striking out the eighth paragraph, the same beginning with the words, "Plaintiff says that after the expenditure," and ending with the words, "said Sherman Anti-trust law."

7. By striking out the ninth paragraph, the same beginning with the words, "Plaintiff further says that after the dissolving of said association," and ending with the words, "said legal opinion of counsel."

8. By striking out the tenth paragraph, the same beginning with the words, "The said defendant, The Stratton

Fire Clay Company," and ending with the words, "The Stratton Fire Clay Company."

9. By striking out the eleventh paragraph, the same beginning with the words, "Plaintiff says that after said advice of counsel," and ending with the words, "to regulate the output of all sewer pipe under said patent." But should the court overrule this motion to strike out the eleventh paragraph, then the defendant moves the court to strike out the following parts thereof: (1) The words, "after said advice of counsel so obtained by said manufacturers"; (2) the words, "with a view of meeting the requirements of said legal opinion, so that all said manufacturers formerly belonging to said association could legally manufacture and fix prices of sewer pipe", (3) the words, "for said purpose", (4) the words, "represented to this defendant that said letters patent were of great value because of said legal opinion to said manufacturers of sewer pipe and of their desire to manufacture and fix prices under the same, as aforesaid, and did"; (5) and the words "not only fraudulently so represent as hereinbefore set forth, but."

10. By striking out the fifteenth paragraph, the same beginning with the words, "About the month of March, 1910," and ending with the words, "said purchase of said patent."

11. By striking out the sixteenth paragraph, the same beginning with the words, "Plaintiff says that but for said representations," and ending with the words, "no value whatever to this plaintiff."

12. By striking out the seventeenth paragraph, the same beginning with the words, "Plaintiff further says that at the time he purchased said letters patent," and ending with the words "said purchase as aforesaid."

13. By striking out the eighteenth paragraph, the same beginning with the words, "Plaintiff says that he had known," and ending with the words, "delivered to him said promissory notes as aforesaid."

14. By striking out the twenty-first paragraph, the same

beginning with the words, "Plaintiff further says that about or shortly after the time," and ending with the words, "should be returned to the said plaintiff."

15. By striking out the twenty-second paragraph, the same beginning with the words, "That the relations between the plaintiff and the said defendant," and ending with the words "as might be convenient between them."

16. By striking out the twenty-third paragraph, the same beginning with the words, "Plaintiff says that the said Charles M. Stratton," and ending with the words, "said agreement with his said brother, Charles M. Stratton."

17. By striking out the twenty-fourth paragraph, the same beginning with the words, "Plaintiff says that if said patent," and ending with the words, "a violation of the Sherman act as aforesaid."

18. By striking out the twenty-fifth paragraph, the same beginning with the words, "Plaintiff says that but for the interference of the said Charles M. Stratton," and ending with the words, "with full power of disposition as aforesaid."

19. By striking out the twenty-sixth paragraph, the same beginning with the words, "It was agreed at the time of said agreement," and ending with the words, "back to the said Charles M. Stratton."

20. By striking out the twenty-seventh paragraph, the same beginning with the words, "Plaintiff says that he at all times believed," and ending with the words, "the month of January, 1913."

21. By striking out the twenty-eighth paragraph, the same beginning with the words, "The said plaintiff about said date last mentioned," and ending with and including the agreement in writing mentioned in said paragraph, and dated January 30, 1913.

22. By striking out the twenty-ninth paragraph, the same beginning with the words, "Plaintiff further says that the said Charles M. Stratton," and ending with the words, "agreed to be returned and paid to him."

23. By striking out the thirtieth paragraph, the same beginning with the words, "Plaintiff says that he thereupon returned to the said Charles M. Stratton," and ending with the words "said letters patent."

24. By striking out the thirty-first paragraph, the same beginning with the words, "Plaintiff further says that by decision of a United States court," and ending with the words, "manufacturers of sewer pipe."

25. By striking out the thirty-second paragraph, the same beginning with the words, "Said patent has never been used," and ending with the words, "said Charles M. Stratton by him as aforesaid."

And for cause the defendants, and each of them, say that said parts of said amended petition are irrelevant, immaterial, redundant, the statements of mere conclusions, encumber the record, and are prejudicial to the defendants and each of them.

D. M. GRUBER,

A. C. LEWIS,

Attorneys for the Defendants,

Charles M. Stratton et al.

(Motion overruled.)

Demurrer of Charles M. Stratton.

(Filed with Clerk of Courts of Jefferson County, Ohio, May 4, 1914.)

Now comes the defendant Charles M. Stratton and demurs to the amended petition of plaintiff, and for cause says the amended petition does not state facts sufficient to constitute a cause of action.

CHARLES M. STRATTON,

By D. M. GRUBER AND

A. C. LEWIS,

His Attorneys.

(Demurrer overruled.)

Answer of Charles M. Stratton.

(Filed with Clerk of Courts of Jefferson County, Ohio, September 14, 1914.)

Now comes the defendant, Charles M. Stratton, and for answer to the amended petition of plaintiff herein says that he admits that The Stratton Fire Clay Company is and was a corporation duly organized under the laws of Ohio during the time mentioned in said amended petition.

That during the time stated in said amended petition this defendant was president of said corporation.

That on the 5th day of April, 1909, the defendants were indebted to the plaintiff upon four promissory notes, as alleged in said amended petition.

That on the 15th day of December, 1904, the defendant, The Stratton Fire Clay Company, to secure the payment of the two notes calling for \$10,000 each, executed and delivered to plaintiff its certain mortgage deed for the premises described in said amended petition.

That said mortgage contained a provision that if the mortgagor should pay the principal or interest accruing on said notes within thirty days after maturity, then said mortgage was to be void, otherwise to be and remain in full force.

That for several years prior to the 5th day of April, 1909, there existed a combination of manufacturers of sewer pipe and other clay products in the United States.

That thereafter a suit was brought against said association in one of the United States courts within and for the State of New York, for the purpose of dissolving said association as being and transacting its business in violation of the law of the United States commonly known as the Sherman Anti-trust Law.

That said association was dissolved in said suit, and said association was restrained and prevented by the order and

decision of said court from transacting its business under its constitution and by-laws as it had theretofore been doing.

That on the 5th day of April, 1909, plaintiff purchased from this defendant certain letters patent for the manufacture of sewer pipe for the sum of \$30,000, and in payment therefor turned over and transferred in writing to this defendant said promissory notes, which notes this defendant refuses to return to plaintiff, or to pay him the respective amounts thereof.

That no payments have been made to plaintiff on account or on said notes since they were purchased by and transferred to this defendant.

That plaintiff and this defendant and Harper E. Stratton are full brothers.

That plaintiff and this defendant, during the times mentioned in said amended petition, were on terms of brotherly friendship.

That the Stratton Fire Clay Company was not willing to enter into an agreement for the use of said letters patent and the manufacture of sewer pipe thereunder, or to buy said letters patent from the plaintiff, or to pay royalty per press of sewer pipe manufactured under said letters patent, or to buy said letters patent at the price of \$32,000.

That at the time of the purchase of said letters patent this defendant and plaintiff entered into and signed a written contract purporting to show the agreement which was had on said occasion as to the transfer of said letters patent, which said written contract is in the words and figures first set out in said amended petition.

That plaintiff gave this defendant an option for the purchase of said letters patent, under date of January 30, 1913, which said option was in the words and figures set out in said amended petition.

That this defendant paid plaintiff \$10 for said option, which amount was afterwards returned by plaintiff to this defendant, and that said option was never exercised by this defendant.

This defendant says that whether or not manufacturers of sewer pipe, other than the defendant, The Stratton Fire Clay Company, took advice of attorneys upon the subject of controlling the trade and fixing prices in a legal manner, after the dissolution of said association, or as to the extent of the confidence reposed by plaintiff in this defendant, or the parties of said dissolved association, other than The Stratton Fire Clay Company, were ready and willing to enter into an agreement for the use of said letters patent in the manufacture of sewer pipe or to buy said letters patent from plaintiff, or to pay therefor a large royalty per press of sewer pipe manufactured thereunder, or to buy said letters patent at the price of \$32,000, or said patent had never been manufactured by any manufacturer of sewer pipe and other clay products, this defendant is without knowledge, and therefore denies each and every allegation in respect thereof.

Further answering, this defendant says that prior to the commencement of this action the said promissory notes which were transferred by plaintiff to this defendant in payment for said letters patent were fully paid off by the makers thereof.

This defendant denies each and every allegation contained in said amended petition which is not herein and hereby expressly admitted.

D. M. GRUBER,
A. C. LEWIS,

Attorneys for Charles M. Stratton, Defendant.

(Jurat duly signed.)

**Reply to Answer of Charles M. Stratton to the Amended
Petition.**

(Filed with Clerk of Courts of Jefferson County, Ohio, Dec.
21, 1914.)

Now comes the above-named plaintiff and for reply to the answer of Charles M. Stratton, one of the above-named defendants, to the amended petition of plaintiff herein, says he denies each and every allegation of said answer except such facts as are averred in the petition and admitted by the answer of defendant to be true.

E. E. ERSKINE AND
DIO ROGERS,
Attorneys for Plaintiff.

(Jurat duly signed.)

Amendment to Amended Petition.

(Filed with Clerk of Courts of Jefferson County, Ohio, May
10, 1915.)

Plaintiff desires to insert immediately preceding the prayer of his amended petition the following amendment thereto; and further says that this cause comes into this court by appeal from the judgment of the Court of Common Pleas of said county, and that all the matters and facts set up in this amendment to his amended petition have come to his knowledge since said cause was so appealed.

Said plaintiff says that the pretended patent of the defendant, Charles M. Stratton, for the manufacturing of sewer pipe provided with a plurality of longitudinally and diametrically oppositely disposed ribs upon its exterior extending beyond the outer surface of the pipe proper, was on the sixteenth day of April, 1861, patented to one A. Newkumet

(being patent No. 32,079) and of record in the Patent Office of the Commissioner of Patents of the United States in the city of Washington, in the District of Columbia.

Plaintiff further says that said pretended patent of the defendant Charles M. Stratton, for the manufacturing of sewer pipe as claimed by him in the following words and figures, to wit:

"By further reference to said drawings, it will be observed that the invention resides in the forming of longitudinally-disposed plural ribs 1, upon the outer portion of the body 2, of the pipe, said ribs being of such thickness as to project beyond the outer surface of the pipe proper, as to cause self-centering when the small end of one is fitted into the socket or flanged head 3, of the other, as shown at Fig. III, thus causing the openings of each pipe to accurately register with the other throughout the length of the structure, at the same time leaving available space within the joint for the usual filling.

"It will be readily apparent that the invention described not only has the advantage of reinforcement and ability of self-centering with another, but in consequence of its self-centering it occasions no care in associating them in the construction of a sewer, or drain, thus saving time.

"Having thus shown and described my invention, what I claim as new and desire to secure by Letters Patent is:

"1. As a new article of manufacture, a sewer pipe having a socket formed upon one end and provided with a plurality of longitudinally disposed ribs upon its exterior extending from the rear of the socket to the opposite extremity.

"2. As a new article of manufacture, a sewer pipe having a socket formed upon one end and provided with a plurality of longitudinally and oppositely disposed ribs upon its exterior extending from the rear of the socket to the opposite extremity."

was on July 18, 1882, patented to one N. U. Walker (being patent No. 261,190) and of record in the Patent Office of the

Commissioner of Patents of the United States in the city of Washington, in the District of Columbia.

Plaintiff says that sewer pipe without ribs but with sockets, and which said sockets are precisely the same as specified in the application and patent of defendant Charles M. Stratton, has been manufactured by the manufacturers of sewer pipe and sold and used by the consumers of the same for at least forty-five years last past.

Plaintiff further says that the entire invention as claimed and specified in the patent issued to the said defendant Charles M. Stratton is contained and fully covered in the patents of the said A. Newkumet and N. U. Walker, as aforesaid.

Plaintiff says that the letters patent purchased by the plaintiff from the said defendant Charles M. Stratton are invalid and void; that said pretended patent right was neither new, valid nor of any value whatsoever, but was wholly worthless.

Plaintiff further says that the said defendant Charles M. Stratton was fully informed as to all of the foregoing facts at and previously to the sale of the said letters patent by him to the said plaintiff; that the said defendant Charles M. Stratton well knew that said letters patent were invalid, worthless and of no value whatsoever by reason of the issuing of said patents to the said A. Newkumet and N. U. Walker, but wholly failed to disclose said information to the said plaintiff, but with intent to defraud the said plaintiff and deceive him as to the value of the said letters patent fraudulently concealed said information from the said plaintiff, of which the said plaintiff was wholly ignorant, and fraudulently represented to the said plaintiff that said patent was valid and of great value and thereby induced the said plaintiff to purchase said letters patent. That said plaintiff would not have purchased said letters patent but for the fraudulent conduct and deception of the said defendant Charles M. Stratton, as aforesaid, and would not have purchased said letters patent if he had been advised or known that said

patents had been granted to the said A. Newkumet and N. U. Walker, as above set forth.

E. E. ERSKINE,
DIO ROGERS,
Attorneys for Plaintiff.

(Jurat duly signed.)

**Answer of Charles M. Stratton to Plaintiff's Amendment to
His Amended Petition.**

(Filed with Clerk of Courts of Jefferson County, Ohio, May
11, 1915.)

First Defense.

For his first defense to the amendment filed by plaintiff herein by leave of court to his amended petition, the defendant Charles M. Stratton says that he admits that this cause comes into this court by appeal from the judgment of the Court of Common Pleas of said county; that sewer pipe without ribs but with sockets has been manufactured, sold, and used for at least — years last past.

This defendant denies each and every allegation contained in said amendment which is not herein and hereby expressly admitted.

Second Defense.

For his second defense to said amendment filed by plaintiff to his amended petition herein the defendant Charles M. Stratton, says that he adopts and makes part of this defense the admissions and allegations of his foregoing first defense, the same as if fully rewritten herein.

This defendant further says that the patent issued to N. U. Walker, which is referred to in said amendment to said

amended petition as Patent No. 261,190 was not a useful invention; that its design and construction rendered its manufacture impracticable, and for these and other reasons said patent was invalid.

Third Defense.

For his third defense to said amendment filed by plaintiff to his amended petition herein the defendant Charles M. Stratton says that he adopts and makes part of this defense the admissions and allegations of his foregoing first defense, the same as if fully rewritten herein.

This defendant further says that in his amended petition herein plaintiff declares, in substance and effect, that he was induced to buy from this defendant the patent issued to this defendant, by representations of this defendant that the manufacturers of sewer pipe, including this defendant and The Stratton Fire Clay Company, had agreed to and would enter into an unlawful agreement and combination to use said patent in the manufacture of sewer pipe, and in fixing the price at which such sewer pipe should be sold, and that this defendant unlawfully agreed with plaintiff that this defendant and The Stratton Fire Clay Company would unlawfully join with what was known as the Eastern Sewer Pipe Manufacturers in an unlawful association or combination to manufacture and fix prices of sewer pipe under said letters patent, and that this defendant further unlawfully agreed with plaintiff that the said Eastern Sewer Pipe Manufacturers should have the right to fix prices and to regulate the output of all sewer pipe made under said patent.

In his said amended petition plaintiff further declares that he purchased said patent from this defendant and paid therefor the sum of thirty thousand dollars (\$30,000.00), relying upon said representations and said unlawful agreements, and that he would not have purchased said letters patent but for said representations and said unlawful agreements; and plaintiff complains that the refusal of this de-

fendant to carry out said representations and unlawful agreements, and his refusal to enter into said unlawful agreements with said other manufacturers of sewer pipe under said letters patent, rendered said patent worthless and of no value to plaintiff.

Wherefore this defendant says that plaintiff is barred and estopped by his own conduct and declarations from seeking relief in this court from his own unlawful and unconscionable acts and transactions in the premises.

D. M. GRUBER,

A. C. LEWIS,

Attorneys for Charles M. Stratton, Defendant.

(Jurat duly signed.)

Reply to Answer of Charles M. Stratton to Plaintiff's Amendment to His Amended Petition.

(Filed with Clerk of Courts of Jefferson County, Ohio, May 11, 1915.)

Now comes the said plaintiff and for his reply to the answer of Charles M. Stratton to plaintiff's amendment to his amended petition denies each and all the averments and facts stated in said answer except such as are expressly admitted to be true by plaintiff's amended petition and his amendment thereto.

E. E. ERSKINE AND

DIO ROGERS,

Attorneys for Plaintiff.

(Jurat duly signed.)

THE STATE OF OHIO,
Jefferson County, ss:

IN THE COURT OF APPEALS.

No. 61.

WALKER B. STRATTON, *Plaintiff,*
vs.

CHARLES M. STRATTON, HARPER E. STRATTON, and THE
STRATTON FIRE CLAY COMPANY, *Defendants.*

Motion for New Trial.

(Filed May 27, 1915.)

Now comes the defendant Charles M. Stratton and moves the court to set aside the finding, decision, judgment, and decree of the court, and for a new trial, for the following errors, to wit:

1. The court erred in overruling the motion of this defendant filed in said cause in the Common Pleas Court on the 7th day of April, 1914, asking that plaintiff be required to separately state and number the several causes of action alleged in his amended petition.

2. The court erred in overruling the motion filed by this defendant in said cause in the Common Pleas Court on the 7th day of April, 1914, asking that plaintiff be required to amend his amended petition by striking out the certain parts thereof mentioned and designated in said motion.

3. The court erred in overruling the demurrer filed by this defendant in said cause in the Common Pleas Court on the 4th day of May, 1914, to plaintiff's amended petition.

4. The finding and decision of this court that the contract of sale between plaintiff and this defendant was without consideration, because of the invalidity

of the letters patent, which was the subject of said sale, are against the weight of the evidence.

5. The finding and decision of this court that the contract of sale between plaintiff and this defendant was without consideration, because of the invalidity of the letters patent, which was the subject of said sale, are not sustained by the evidence.

6. The finding and decision of this court that the contract of sale between plaintiff and this defendant was without consideration, because of the invalidity of the letters patent, which was the subject of said sale, are contrary to law.

7. The finding and decision of this court that the contract of sale between plaintiff and this defendant was without consideration, because of the invalidity of the letters patent, which was the subject of said sale, are contrary to equity.

8. The judgment and decree of this court that the letters patent mentioned in plaintiff's amended petition, and in his amendment thereto, which was sold by this defendant to plaintiff, is invalid, are against the weight of the evidence.

9. The judgment and decree of this court that the letters patent mentioned in plaintiff's amended petition, and in his amendment thereto, which was sold by this defendant to plaintiff, is invalid, are contrary to law.

10. The judgment and decree of this court that the letters patent mentioned in plaintiff's amended petition, and in his amendment thereto, which was sold by this defendant to plaintiff, is invalid, are contrary to equity.

11. The judgment and decree of this court in favor of the plaintiff and against this defendant, for \$—, are against the weight of the evidence.

12. The judgment and decree of this court in favor of the plaintiff and against this defendant are not sustained by the evidence.

13. The judgment and decree of this court in favor of the plaintiff and against this defendant are contrary to law and equity.

14. The judgment and decree of this court should have been in favor of this defendant and against the plaintiff.

15. The court erred in the admission of evidence on behalf of plaintiff over the objection of this defendant, to which this defendant then and there excepted.

16. The court erred in rejecting evidence offered by this defendant, to which ruling of the court this defendant then and there excepted.

17. This court erred in assuming jurisdiction to determine the question of the validity or invalidity of the letters patent mentioned and designated in the amended petition and in the amendment to the amended petition of plaintiff.

18. For other errors apparent on the face of the record.

D. M. GRUBER.
A. C. LEWIS.

(Motion overruled.)

Certificate of Copies.

STATE OF OHIO,

Jefferson County, ss:

I, John C. Smythe, clerk of the courts within and for said county and State, in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio, to be kept, do hereby certify that the foregoing amended petition of plaintiff, motion, demurrer, and answer of Charles M. Stratton, reply of plaintiff to answer of Charles M. Stratton to the amended petition, amendment to amended petition of plaintiff, answer of Charles M. Stratton to plaintiff's amendment to amended petition, the reply of Walker B. Stratton to answer of Charles M. Stratton to plaintiff's amendment to amended petition, and the motion for a new trial of Charles M. Stratton are true and correct copies of the original pleadings now on file in said clerk's office in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Steubenville, Ohio, this 24th day of September, A. D. 1915.

[SEAL.]

JOHN C. SMYTHE, *Clerk.*

FACTS.

The case at bar was first tried in the Common Pleas Court of Jefferson County, Ohio, on the issues made up in the pleadings in said court, and a finding and judgment was rendered in favor of the plaintiff, Walker B. Stratton, in the sum of \$33,470, with interest from the 4th day of January, 1915.

The defendant, Charles M. Stratton, appealed the case to the Court of Appeals of the Seventh Appellate District of the State of Ohio, where the case was tried *de novo* on the issues made in the pleadings in said Court of Appeals at the May term, 1915, thereof, and a finding and judgment was rendered by said Court of Appeals in favor of the plaintiff, Walker B. Stratton, in the sum of \$34,100 with interest from the 10th day of May, 1915.

Defendant, Charles M. Stratton, filed his motion for a new trial, and the same was overruled.

Defendant, Charles M. Stratton, did not file a motion in the Supreme Court of the State of Ohio to have the record of said Court of Appeals certified to the Supreme Court of the State of Ohio, but filed a petition for writ of error to the Supreme Court of the United States, together with assignment of errors in said Court of Appeals, and same was heard and allowed by the Honorable W. H. Spence, presiding judge of said Court of Appeals, in an *ex parte* proceeding.

Said petition for writ of error and assignment of errors, together with the finding of facts and the opinion of said Court of Appeals, are found in the appendix hereof.

POINTS AND AUTHORITIES.

(a.)

This court has no power to review the judgment of the Court of Appeals of the Seventh Appellate District of the State of Ohio in the case at bar, said appellate court not being the highest court in the State of Ohio, and the defendant, Charles M. Stratton, not having filed a motion in the Supreme Court of Ohio (the highest court in the State of Ohio) for an order on said appellate court to certify its record to said Supreme Court, or make any other attempt to have the case at bar reviewed by the Supreme Court of Ohio, and not having exhausted his remedies in the courts of the State of Ohio, the doors of said courts were not yet closed against him.

Fisher vs. Perkins, 122 U. S., 523.

Great Western Telegraph Co. vs. Burnham, 162 U. S., 339.

Mullen vs. Western Union Beef Co., 173 U. S., 116.

(b.)

"A suit on the contract of which the patent is the subject-matter either to enforce such contract or to annul it where the decision of the State court is based upon the contract does not present a Federal question."

Dale Tile Mfg. Co. vs. Hyatt, 125 U. S., 46.

Felix vs. Schwarnweber, 125 U. S., 54.

Walter A. Wood Mowing, etc., Machine Co. vs. Skinner, 139 U. S., 293.

"The Federal courts have no right irrespective of diverse citizenship to entertain suits for the amount of an agreed license or royalty or for the specific execution of a contract for the sale or use of a patent or to set aside such a contract or of other suits where

a subsisting contract is shown governing the rights of the party in the use of or right to an invention. Such suits not only may but must be brought in the State courts."

Wade vs. Lawder, 165 U. S., 624.

Dale Tile Mfg. Co. vs. Hyatt, 125 U. S., 46.

Albright vs. Teas, 106 U. S., 613.

"In an action in the State court for the price of a patented machine or article sold defendant or upon a note given therefor, or on other contracts relating to the sale and use of the same, it is a valid defense in the State court that the patent was void because of want of novelty and utility and because it was an infringement on prior patents. And it is no objection to the jurisdiction of the State court that the question of validity may involve the examination of conflicting patents or of testimony of experts. It is the fact of invalidity and not the reason for it that is material."

Pratt vs. Paris Gas Light, etc., Co., 168 U. S., 255.

Rich vs. Atwater, 16 Conn., 409.

McClure vs. Jeffrey, 8 Ind., 79.

Nye vs. Raymond, 16 Ill., 153.

"Where a suit is brought on a contract of which a patent is the subject-matter either to enforce such contract or to annul it, the case arises on the contract or out of the contract and not under the patent laws."

Wade vs. Lawder, 165 U. S., 624.

"To constitute an action one arising under the patent right laws of the United States the plaintiff must set up some right, title or interest under the patent laws or at least make it appear that some right or privilege under those laws will be defeated by one construction or sustained by the other construction of these laws. When a State court has jurisdiction both of the parties and the subject-matter, as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that incidentally to his defense the defendant claims the invalidity of a certain patent."

Pratt vs. Paris Gas Light, etc., Co., 168 U. S., 255.

(c.)

"The certificate of the Chief Justice of the Supreme Court of the State on the allowance of the writ of error that the judgment denied a title, right or immunity specially set up under the statutes of the United States cannot in itself confer jurisdiction on this court."

Allen vs. Arguimbau, 198 U. S., 149.

Home for Incurables vs. New York, 187 U. S., 155.

Yazoo, etc., R. Co. vs. Adams, 180 U. S., 41.

(d.)

"Where a State court in rendering a judgment decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to support the judgment, this court will dismiss the writ of error without considering the Federal question."

Rutland R. Co. vs. Central Vermont R. Co., 159 U. S., 630.

Capital National Bank vs. Cadiz First National Bank, 172 U. S., 425.

Harrison vs. Morton, 171 U. S., 38.

Pierce vs. Somerset R. Co., 171 U. S., 641.

"Where it does not appear on which of the two grounds the judgment was based then if the independent ground on which it might have been based was a good and valid one sufficient of itself to sustain the judgment this court will not assume jurisdiction of the case."

Klinger vs. Missouri, 13 Wall., 263.

Giles vs. Teasley, 193 U. S., 146.

(e.)

All so-called Federal questions raised by the assignment of errors herein have been determined contrary to the contentions of defendant, Charles M. Stratton.

Brown et al. vs. Piper, 91 U. S., 37.

Penn. Railroad vs. Locomotive Truck Co., 110 U. S., 494.

ARGUMENT.

This court has no power to review any other judgments of the courts of a State than those of the highest court in which a decision in the suit could be had. (Section 709 of the Revised Statutes.)

The highest court of the State of Ohio is the Supreme Court, and the manner in which cases may be reviewed in the Supreme Court of Ohio is by motion in the Supreme Court for an order on the Court of Appeals of any appellate district in the State of Ohio to certify its record to the Supreme Court. (See Appendix, article IV of the Constitution of Ohio.)

The law governing the review of cases in the Supreme Court of Ohio was announced October 7, 1913, by the said Supreme Court in the case of *The City of Akron vs. Roth*, 88 Ohio State, page 456. (See Appendix for Syllabus of said case.)

The defendant, Charles M. Stratton, did not file an application in the Supreme Court of Ohio for an order on the Court of Appeals to certify its record in said Supreme Court to be reviewed on any grounds (see Appendix, certificate of the clerk of the Supreme Court of Ohio) nor make any attempt whatever to have the above case reviewed in the highest court in the State of Ohio.

That the defendant, Charles M. Stratton, sought a writ of error direct from the Court of Appeals of the Seventh Appellate District of Ohio without making any attempt whatever to have his case reviewed by the highest court in the State of Ohio is shown on the face of the petition for a writ of error to the presiding justice of said appellate court.

It would seem quite probable that if the defendant, Charles M. Stratton, suffered an injustice by the trial court taking jurisdiction of the case at bar on the matters set forth in the pleadings, and rendered a finding and judgment contrary to

the decision of the United States Supreme Court, the case at bar would be of such "public and great general interest" that a motion in the Supreme Court of Ohio to have the record of said appellate court certified to the Supreme Court would have been sustained and the said Supreme Court could then have passed upon the questions raised in this writ of error. But whether this be true or not, as was said by Chief Justice Waite in the case of *Fisher vs. Perkins*, 122 United States, page 523: "We are not to assume that an appeal would not have been granted if applied for. The record must show its refusal."

In the case at bar, and under the decisions set out under Points and Authorities, (a) the failure of defendant, Charles M. Stratton, to make any attempt to have his case reviewed or heard in the highest court of the State of Ohio, is fatally defective, and this court is without jurisdiction to review this case, for the reason that the finding and judgment in the same is not the finding and judgment of the highest court of the State of Ohio.

The plaintiff, Walker B. Stratton, further submits in argument that an examination of the record in the case at bar will disclose no Federal question, nor is there a Federal question in said case. The case at bar was an action in equity to set aside the transfer of certain notes given by Walker B. Stratton to Charles M. Stratton for certain letters patent, on the ground of a failure of consideration for said transfer, and the court found that the transfer of said notes was without consideration on different grounds, one of which was that said letters patent were invalid and void. (See Appendix, finding of facts and conclusions of law by Court of Appeals.)

"A suit on a contract of which a patent is the subject-matter either to enforce such contract or to annul it where the decision of the State Court is based upon the contract does not present a Federal question."

For authority see Points and Authorities (b).

As to the contention of defendant, Charles M. Stratton, that the contract set out in plaintiff's amended petition was in violation of the Sherman Anti-trust law, and thus raised a Federal question, we submit that portion of the opinion rendered by the Court of Appeals, which reads as follows:

"It is claimed on the part of the defendant that because of this illegal transaction that a court of equity will leave the parties where they are, and for that reason Walker cannot recover. The sale of this patent right was entirely legal. There was nothing wrong about it.

"The court is not in doubt but what Charles was holding out the inducement that this company would take the patent and that Walker expected to sell the patent to them. The expectation that Walker would sell the patent to a combination which would use it for an illegal purpose would not make the sale of the patent between Charles and Walker illegal. It would not have been an illegal sale for Walker to have sold this patent to the combination of sewer-pipe manufacturers. The illegality would only arise when the combination attempted to use the patent as a cloak to avoid the Sherman Anti-trust law.

"For these reasons we think the sale between Charles and Walker was not illegal, and that the contentions of both the plaintiff and the defendant on the grounds of illegality of the contract are not well taken.

"We call counsel's attention to a discussion of this proposition in 9 Cyc., page 550, and the cases there cited."

It will be observed that there was no issue raised in this case as to any rights the defendant, Charles M. Stratton, may have claimed under the Sherman Anti-trust law, and we are at a loss to know what right he could have claimed under said law that would raise such Federal question as to give this court jurisdiction of the case at bar.

The plaintiff, Walker B. Stratton, in his amended petition, set out a written article of agreement entered into on the

5th day of April, 1909, setting forth the terms of the purchase of said patent, and says that said agreement, by mistake and oversight of the said plaintiff and on account of the mistake and fraud of Charles M. Stratton, did not state the agreement which was actually made between them, and then sets forth an article of agreement which, as plaintiff claimed, did include all the terms of the agreement. The defendant, Charles M. Stratton, acknowledged signing the first article of agreement, and denied that he agreed to any other terms than those set out in the first article of agreement, and by general denial denied the second agreement to be the agreement made and entered into by the plaintiff and the defendant. (See amended petition of plaintiff and answer of Charles M. Stratton to amended petition.) On this issue the court found:

"Second. That the testimony does not support the issue made in the pleadings that the written contract made between the plaintiff and the defendant on April 5, 1909, was not, by reason of either fraud or mutual mistake, the true contract entered into between the parties.

"Third. That the testimony in the case does not support the contention of the plaintiff that the contract of April 5, 1909, was induced and caused to be made by the false and fraudulent representations of the defendant, Charles M. Stratton."

(See Appendix, finding of facts by trial court.)

In other words, the court found that the defendant, Charles M. Stratton, did not agree to enter into a combination to fix prices or control output contrary to the Sherman Anti-trust law. So we submit to this court that from this finding of the trial court, on the issues made in the pleadings, there is no right claimed under a Federal statute by the defendant, Charles M. Stratton, in which he was injured or an injustice done him, but, on the contrary, his contentions in the pleadings were found to be as he claimed therein.

We further submit that there being no Federal question

raised in the record, that it is elementary that the certificate of a court of last resort may not import a Federal question into a record where such question does not arise, and that it would be equally true where the trial court is not the highest court of the State, that the certificate of said trial court that it was the highest court in which a judgment could be had is not evidence that the same is the highest court of the State. (See Points and Authorities (c)).

Plaintiff further submits to this honorable court that even though a Federal question appears in the case at bar it would not be sufficient to give jurisdiction to this court, as there were other questions in this case amply sufficient at law to sustain the finding and judgment.

The plaintiff in the case at bar sought to recover the value of the notes transferred for certain letters patent, as above set forth, on the following grounds:

"1st. No valuable consideration for the transfer of the notes of thirty thousand dollars in value.

"2d. An illegal consideration for the transfer of the notes. The consideration being a proposed unlawful combination in violation of the Anti-trust act.

"3d. That the transfer of the notes was obtained by fraudulent representations and promises not kept nor intended at the time to be kept.

"4th. That the contract as written only shows a part of the contract as actually made and intended by the parties and should be reformed.

"5th. That there was a subsequent agreement between the parties by which Charles bought the patent back.

"6th. That the patent was void by reason of previous patents and long use by the public of socket sewer pipe."

(See plaintiff's amended petition and the amendment thereto.)

The court found that said letters patent were worthless, void, and of no value. (*See Appendix, finding of facts by Court of Appeals.*)

Said letters patent being worthless and of no value without regard to their invalidity would be ample grounds for the setting aside of the transfer of the said notes for failure of consideration when said worthless letters patent were the only consideration for the transfer of the said notes, as in this case. In support of the above contention see cases cited in Points and Authorities (d).

Plaintiff further submits to this honorable court that the questions upon which the decision in the case at bar depend have been repeatedly decided by this court contrary to the contentions of defendant Charles M. Stratton, and that said finding of facts and conclusions of law were in line with the former decisions of this court.

Brown et al. vs. Piper, 91 United States, page 37.

Penn. Railroad vs. Locomotive Truck Company, 110 United States, page 494.

Therefore the plaintiff Walker B. Stratton respectfully submits that the writ of error in the present litigation, in which he has heretofore been successful at every stage, is taken for delay only, and that the contentions upon which it is claimed a Federal question depend are apparently so frivolous as to not require further argument.

Respectfully submitted,

E. E. ERSKINE,

C. A. VAIL, AND

D. A. HOLLINGSWORTH,

Attorneys for Plaintiff Walker B. Stratton.

APPENDIX.

Pursuant to the rules and practices of this honorable court, and for the purposes of these motions only, the plaintiff Walker B. Stratton has caused to be printed the assignment of errors to the Court of Appeals of the Seventh Appellate District of the State of Ohio, and petition for writ of error filed herein, also the opinion and finding of facts and conclusions of law of the said Court of Appeals, also article IV of the Constitution of Ohio and the syllabus in the case of *The City of Akron vs. Roth*, 88 Ohio State, page 456, and the certificate of the clerk of the Supreme Court of the State of Ohio.

Authorities:

Carey vs. Houston, 150 U. S., 179.

Rouch vs. Nevin, 128 U. S., 579.

Finding of Facts and Conclusions of Law by the Appellate Court of the Seventh District of Ohio Found on Request of the Defendant Charles M. Stratton, as is Found in the Entry in the Case at Bar.

"STATE OF OHIO,

Jefferson County, ss:

IN THE COURT OF APPEALS, SEVENTH DISTRICT.

WALKER B. STRATTON, *Plaintiff,*

vs.

CHARLES M. STRATTON ET AL., *Defendants.*

Finding of Facts.

This day this cause came on to be heard upon the amended petition of plaintiff, the amendment thereto, the separate answer of the defendant, Charles M. Stratton, and the reply

thereto, the cause as to the other defendants not having been appealed to this court, and on the testimony of witnesses and arguments of counsel; and, thereupon, the court, being requested by the defendant, Charles M. Stratton, to separately state its finding of facts, and its conclusions of law in the case, do find from the testimony as to the facts in this case the following:

First. That the letters patent described in plaintiff's amended petition was at the time of its transfer from Charles M. Stratton to Walker B. Stratton, to wit: April 5, 1909, worthless, void, and of no value. That afterwards, to wit: On the 30th day of January, 1913, the plaintiff, Walker B. Stratton, tendered to the defendant, Charles M. Stratton, the letters patent above referred to and demanded a return of the notes and mortgages given in consideration therefor. That prior to the bringing of this action the obligors on said notes paid to the said Charles M. Stratton the full amount due thereon, and that the notes and mortgages securing the same were delivered by Charles M. Stratton to the obligors.

Second. That the testimony does not support the issue made in the pleadings that the written contract made between the plaintiff and the defendant on April 5, 1909, was not, by reason of either fraud or mutual mistake, the true contract entered into between the parties.

Third. That the testimony in the case does not support the contention of the plaintiff that the contract of April 5, 1909, was induced and caused to be made by the false and fraudulent representations of the defendant, Charles M. Stratton.

The court finds as a conclusion of law as follows: That by reason of the worthlessness and invalidity of said letters patent there was no valuable consideration for the transfer of the notes and mortgages set out in plaintiff's amended petition, and that by reason of the defendant, Charles M. Stratton, having collected the amount due on said notes and mortgages the court cannot now order the return of said notes and mortgages, and by reason thereof, there is now due from

said Charles M. Stratton to the said Walker B. Stratton the sum of \$30,000, with interest from the 30th day of January, 1913, to the 10th day of May, 1915, being the sum of \$34,100.

It is, therefore, considered by the court that the plaintiff, Walker B. Stratton, recover from the defendant, Charles M. Stratton, the sum of \$34,100, and his costs herein expended, taxed at \$90, for which execution is awarded.

* * * * *

It is further ordered; adjudged, and decreed that the plaintiff, Walker B. Stratton, transfer to the defendant, Charles M. Stratton, said letters patent, and shall deposit the same with the clerk of court for delivery to the defendant, Charles M. Stratton, on payment by him of said sum of \$34,100 with interest thereon from the 10th day of May, 1915, being the first day of this term of court.

Thereupon said defendant having filed his motion to set aside the findings of fact and of law, and the decision of the court, and for a new trial, and the same coming on to be heard, the court, on consideration thereof, overrules the same.

To all and each of which findings and conclusions of fact and of law, and to said judgment, decree, and ruling of the court, except the finding that the contract of sale between plaintiff and said defendant, executed on the 5th day of April, 1909, and on that day signed by the parties thereto, being said Exhibit Number Three, was the agreement actually made between the parties thereto, the said defendant, Charles M. Stratton, excepts.

Forty (40) days from the date of the overruling of said defendant's said motion to set aside said findings and conclusions of fact and of law, and the decision of the court, and for a new trial, are allowed said defendant, Charles M. Stratton, in which to reduce his exceptions to writing and file his bill of exceptions in this case, and the Journal is ordered kept open for that purpose.

Thereupon said plaintiff excepts to that part of the court's conclusion of law which is as follows:

"There is now due from said Charles M. Stratton to the said Walker B. Stratton the sum of \$30,000, with interest from the 30th day of January, 1913, to the 10th day of May, 1915, being the sum of \$34,100."

THE STATE OF OHIO,
Jefferson County, ss:

IN THE COURT OF APPEALS.

In Equity.

WALKER B. STRATTON, *Plaintiff,*

vs.

CHARLES M. STRATTON, HARPER E. STRATTON, and THE
STRATTON FIRE CLAY COMPANY, *Defendants.*

Petition for Writ of Error.

(Filed Aug. 5th, 1915.)

*To the Honorable W. H. Spence, Presiding Judge of said
Court of Appeals:*

Charles M. Stratton, a defendant in the above-entitled case, shows by this petition to this honorable court that in the records, proceedings, and decisions in the Court of Appeals of the Seventh Appellate District of the State of Ohio, at the May, 1915, term, held by said Court of Appeals in and for the county of Jefferson, in said appellate district, the said Court of Appeals being the highest court of said State in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of this defendant.

That as appears in the records and proceedings there was drawn in question :

First. The validity of certain letters patent issued under and by virtue of the laws of the United States of America to said defendant; the judgment of said court in favor of said plaintiff and against this defendant being based solely on the finding and decision of said court that said letters patent were and are invalid.

Second. Plaintiff's cause of action, set out in his amended petition, and in his amendment thereto, was and is based on the averments that said defendant at the time said defendant sold to plaintiff certain letters patent then belonging to said defendant, then and there agreed with plaintiff, as a part of the contract of sale, that he, said defendant, would join a combination of persons and corporations engaged in the manufacture of sewer pipe, for the manufacture and sale of sewer pipe under said letters patent, and that said combination of sewer pipe manufacturers should have the right to regulate and limit the quantity and fix the price of sewer pipe to be manufactured and sold under said letters patent, and plaintiff in said action sought to recover a judgment against said defendant, as one ground for said action, because of said defendant's refusal to join said combination of sewer pipe manufacturers for the purposes aforesaid. Said defendant in his answer to said amended petition, and to the amendment thereto, denied that he ever agreed with plaintiff to join with any person or combination of persons, or corporations, for the manufacture or sale of sewer pipe under said letters patent, for the purpose of regulating and limiting the production or fixing the price of said sewer pipe, or for any purpose whatsoever. Said plaintiff, by reason of the premises, was not entitled to a judgment or decree against said defendant in a court of equity, or at all, and by reason of the premises was not entitled to maintain said action. Said court failed to determine said issue, although said defendant duly requested said court to separately state its findings of fact and conclusions of law.

All of which fully appears in the records and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Court of Appeals be reversed.

CHARLES M. STRATTON,

Defendant,

By his attorneys in law and in fact,

ADDISON C. LEWIS,

DAVID M. GRUBER,

Attorneys and Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 3d day of August, A. D. 1915. The writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of \$70,000.

Dated at Lisbon, Ohio, this 3d day of August, A. D. 1915.

W. H. SPENCE,

*Presiding Judge of the Court of Appeals of
the Seventh Appellate District of the State
of Ohio for said County of Jefferson.*

Assignment of Errors.

IN THE COURT OF APPEALS.

THE STATE OF OHIO,
Jefferson County, ss:

(Filed Aug. 5th, 1915.)

WALKER B. STRATTON, *Plaintiff,*

vs.

CHARLES M. STRATTON, HARPER E. STRATTON, and THE
STRATTON FIRE CLAY COMPANY, *Defendants.*

Now comes Charles M. Stratton, a defendant in the above-entitled action, and respectfully submits that in the record, proceedings, findings, decision, and final judgment of the Court of Appeals of the Seventh Appellate District of the State of Ohio, sitting in said county of Jefferson, at the May, 1915, Term of said court, holden therein, in said action there is manifest error in this, to wit:

First. The court erred in overruling the motion of said defendant to set aside the finding, decision, judgment, and decree of the court and for a new trial.

Second. The court erred in its finding of fact that the letters patent described in plaintiff's amended petition was, at the time of its transfer from said defendant to said plaintiff, to wit, April 5, 1909, invalid, and therefore of no value.

Third. The court erred in failing to determine the issue raised by the third defense contained in said defendant's answer to plaintiff's amendment to his amended petition, which said defense in said answer was a complete defense to plaintiff's cause of action and involved a Federal question, and was a proper and vital issue in said action, and if determined in favor of said defendant, as it should have been, said defendant would have been entitled to have had

the court render a judgment in his favor instead of in favor of said plaintiff.

Fourth. The court erred in finding as a conclusion of law that by reason of the invalidity of the letters patent sold and transferred by said defendant to said plaintiff as consideration for the transfer of the notes and mortgages set out in plaintiff's amended petition, there was no valuable consideration for said transfer.

Fifth. The court erred in finding as a conclusion of law that said defendant having collected the amount due on said notes and mortgages, and by reason thereof, there is now due from said defendant to said plaintiff the sum of \$30,000 with interest from the 30th day of January, 1913, to the 10th day of May, 1915, being the sum of \$34,100, or that there was any sum whatsoever due from said defendant to said plaintiff.

Sixth. The court erred in finding as a conclusion of fact that said defendant's letters patent, being the consideration for the notes and mortgages sold and transferred by the defendant to said plaintiff, as set forth in plaintiff's amended petition, and in the amendment to said amended petition, was void.

Seventh. The court erred in finding as a conclusion of law that said letters patent sold and transferred by said defendant to said plaintiff, as aforesaid, was invalid.

Eighth. The court erred in failing to find as a conclusion of fact that the alleged contract set out by plaintiff in his amended petition, and referred to in his amendment to his said amended petition, and upon which he sought relief against, and to recover from said defendant, was in violation of the Federal law, commonly known as the Sherman Anti-trust law.

Ninth. The court erred in failing to find as a conclusion of law that the alleged contract set out by plaintiff in his amended petition, and referred to in his amendment to his said amended petition, and upon which he sought relief against, and to recover from said defendant, was in violation of the Federal law, commonly known as the Sherman Anti-

trust law, and that therefore plaintiff was not entitled to relief in a court of equity or to recover against said defendant.

Tenth. The court erred in failing to find that by reason of the contract pleaded and relied upon by plaintiff, being in violation of the Federal statute known as the Sherman Anti-trust law, was contrary to equity and good conscience, and that therefore plaintiff was not entitled to a judgment or decree against said defendant in a court of equity, or at all, and was not entitled to maintain said action.

Eleventh. The court erred in rendering judgment in favor of said plaintiff and against said defendant in the sum of \$34,100, and his costs therein expended.

Twelfth. The court erred in rendering judgment in favor of said plaintiff and against said defendant.

Wherefore said defendant prays that said judgment be reversed.

D. M. GRUBER,
ADDISON C. LEWIS,

Attorneys for Charles M. Stratton, Defendant.

Certificate of Copies.

STATE OF OHIO,

Jefferson County, ss:

I, John C. Smythe, clerk of the courts within and for said county and State, in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing petition for writ of error, assignment of errors, and finding of facts and conclusions of law are true and correct copies of said petition for writ of error, assignment of errors, and finding of facts and conclusions of law now on file in said clerk's office in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Steubenville, Ohio, this 24th day of September, A. D. 1915.

[Seal Court of Appeals, Jefferson County, Ohio.]

JOHN C. SMYTHE, *Clerk.*

Opinion.

THE STATE OF OHIO,
Jefferson County, ss:

IN THE COURT OF APPEALS, SEVENTH DISTRICT,
 MAY TERM, 1915.

WALKER B. STRATTON, *Plaintiff,*

vs.

CHARLES M. STRATTON, HARPER E. STRATTON, and THE
 STRATTON FIRE CLAY COMPANY, *Defendants.*

Pollock, J.; Metcalfe and Spence, JJ., concur.

POLLOCK, J.:

Walker B. Stratton brought an action against these defendants in the court below to set aside on the ground of fraud and on other grounds, the sale to him by Charles M. Stratton of a certain patent right to manufacture sewer pipe. He alleges that in consideration of the transfer of that patent right to him he transferred and delivered to Charles M. Stratton four promissory notes, executed by The Stratton Fire Clay Company, amounting to thirty thousand dollars. That two of these notes were secured by a mortgage on The Stratton Fire Clay Company's property and he asks that these notes and mortgage be returned to him by the defendant, and that the mortgage be foreclosed.

He claims that he has a right to this relief upon six different grounds. He claims that the patent right was void by reason of a previous patent and long use by the public of a socket sewer pipe. He also claims that there was no valuable consideration for the transfer of these notes and mortgage, and he further claims an illegal combination for the transfer of the notes, being an illegal combination in violation of the Sherman Anti-trust law, and that this combina-

tion was not carried out, and therefore he has a right to the return of the consideration paid.

That the transfer of the notes was obtained by fraudulent representation upon the part of Charles M. Stratton and that the contract as written only shows a part of the contract as actually made and intended by the parties and should be reformed. In other words, that either through mistake or fraud on the part of Charles M. Stratton the contract as written did not express the true contract between them and he asks that it be reformed. Again, he claims there was a subsequent agreement after the sale of this patent to him; that he and Charles M. Stratton entered into an agreement by which he agreed to sell this patent back to Charles M. Stratton for the sum of thirty thousand dollars, and that Charles refused to carry into effect that contract.

There was an issue made by answer of all of these defendants and the case went to trial in the court below resulting in a finding in favor of the defendants Harper E. Stratton and The Stratton Fire Clay Company against the plaintiff and a finding in favor of the plaintiff, Walker B. Stratton, against Charles M. Stratton for the amount of the consideration paid. Charles M. Stratton appealed the action to this court. It was stated in the opening statement of the case that the only question we have to try is between Walker and Charles.

This case was submitted upon a transcript of the evidence taken in the court below and upon additional evidence here. The record is so long that I will not attempt to refer to the evidence, at least to much of it, except the conclusions that we draw from it.

The facts show that Walker B. and Charles M. are brothers; that they had both been engaged in the sewer-pipe business probably as long as they had been engaged in any business up to within a few years prior to this transaction when Walker B. sold his interest to his brothers, Charles and Harper, in these Stratton Fire Clay Companies.

These were incorporated companies but really under the control of Charles M. Stratton, Harper E. and some other parties having a small interest. There existed a combination between a large number of sewer-pipe manufacturing concerns of this country up until two or three years prior to the time of this transaction, which controlled or attempted to control the output and fix and establish the prices at which sewer pipe should be sold to the trade.

Undoubtedly Walker B. Stratton belonged to this combination up to the time of the sale of his interest to The Fire Clay Company. Charles about that time or prior thereto became a member. There is some little dispute, but we think without question he became a member of this combination and continued to be a member up to the time of its dissolution.

There was an action brought in the Federal court a few years before this transaction against this combination on the ground it was illegal and against what is commonly known as the Sherman Anti-trust law. That action was prosecuted to its completion and resulted in a verdict, finding it was an illegal combination and ordering its dissolution.

After the dissolution of this combination, the members of it, being concerned about their trade and business, went about to find out how they could still continue doing these things they had been doing under this combination and yet not be in violation of the Anti-trust law. They consulted a number of eminent attorneys over the country and they received an opinion by which they were advised that if they could procure a patent sewer pipe that they then could combine under that patent and make use of that patent and they could do what they had been doing prior to that time under the old combination and yet not be illegal.

There is no question but what Charles knew of this opinion prior to the sale of this patent, and there is no question but what Walker knew of it. We think without doubt that Charles, after this opinion was given, went about trying to

get up a patent that he might dispose of it to this combination which was formed and receive the benefits of the sale of his patent. So he proceeded to get up a patent.

He first applied for a patent on what he called a sewer pipe having longitudinally disposed plural ribs upon its exterior, and another condition in the patent which he claimed to be new and applied for a patent on that improvement that these four ribs were diametrically opposite on the outside of the sewer pipe. His application was rejected by the Patent Office on the ground that there was a former patent covering this claimed new condition, the Newkumet patent, which had been granted prior to that time.

After that he amended this application by referring to the socket and stating that these ribs extended from the socket to the opposite extremity of the pipe and was granted a patent in the summer of 1908 on his invention.

Some time in September or October, 1908, he made this known to Walker and there was some talk about it. Walker left for some business he had in the South and remained away until about the first of April, 1909, when he came back and after some negotiations, testified on the one hand by Charles and on the other hand by Walker, this patent was sold by Charles to Walker for thirty thousand dollars as evidenced by these notes and mortgage, which were turned over to Charles.

Some time after that and after Walker had gone South he was notified to meet the persons interested in this combination in New York and he met them with a view of selling this patent. His patent was not then disposed of. Now, about that time he complains to Charles that the contract as written does not include all of their agreement. In other words, that it is not as they had intended to make their agreement, at that time intending that there should be a provision in it that Charles and his companies should manufacture, if they manufactured under a patent, under this patent alone. In the sale of this patent Charles reserved the right

to his companies to manufacture under this patent and has continued to reserve it.

There were further negotiations between Walker and those representing this combination of sewer-pipe manufacturers about the purchase of this patent. They entered into an agreement by which Walker was to sell this patent to this combination, or persons representing it, for \$32,000 on condition that Charles would enter into this combination with his companies.

Some time after this Mr. Seiberling, of Akron, took up this matter with Charles and after that had been taken up some with Charles, Walker claimed that Charles came to him and made known to him that he knew of his arrangement to sell this patent, and made objection to him selling it to the combination and claimed that he could sell it to a better advantage himself. Walker claims at that time he entered into an agreement with his brother Charles by which he was to sell this patent back at \$30,000 and Charles agreed to pay him \$30,000 for it. Charles claims that no such an agreement was entered into; that he asked for an option which was refused.

Now the negotiations continued with Mr. Seiberling and there was a written contract drawn to be executed between Charles and the company represented by Mr. Seiberling, which was this combination in short, by which Charles agreed to sell this patent to the combination for \$32,000 and some other rights. That contract was put in writing. There is some dispute about certain times, etc., but there was a written contract drawn to that effect which was never signed, because of Harper's refusal to have anything to do with the combination.

Some time after this, what was known as "The Bath Tub Combination" was held by a Federal court to be a violation of the Sherman Anti-trust Law and was ordered dissolved. The bath-tub combination were operating under a patent similar to the proposed combination of the sewer-pipe manufacturers, and this decision terminated any effort on the part

of the sewer-pipe manufacturers to form a combination and left Walker the owner of this patent. Soon after this decision, this action was instituted in the court below.

We will take up first a claim of plaintiff's that the patent was void by reason of a previous patent and the long use by the public of socket sewer pipe. As before stated, Charles first attempted to get a patent on account of these ribs on the outside of this sewer pipe. That was denied him because of a former patent. He then attempted to get the patent because of the socket on this sewer pipe and the ribs extending from one extremity to the other, and he received a patent on that condition.

In order to determine whether this patent was void, we must look to what the patentee claimed to be new and he desired a patent on as stated in his specifications. He says: "Having thus shown and described my invention, what I claim as new and desire to secure by letters patent is: 1. As a new article of manufacture, a sewer pipe having a socket formed upon one end and provided with a plurality of longitudinally disposed ribs upon its exterior extending from the rear of the socket to the opposite extremity. 2. As a new article of manufacture, a sewer pipe having a socket formed upon one end and provided with a plurality of longitudinally and oppositely disposed ribs upon its exterior extending from the rear of the socket to the opposite extremity."

Now that is what he obtains his patent on and if his patent is valid, it must be upon his claim as to what was new and what he desired this patent on. So far as these ribs are concerned on the exterior of the sewer pipe, it is disposed of by the Patent Office itself in saying that there was a former patent on such a device.

Further he claims it by reason of this socket or rib extending from the socket to the exterior. The socket is admitted by all parties to be the ordinary socket on what is known here and denominated as standard sewer pipe. It has been in use and common use for many years. Now he combines

these two things, the old commonly used socket and patent ribs and claims and procures a patent upon that combination.

The question arises as to whether or not he can do so under the patent laws of this country? When we consider the question of the validity of a patent as decided by the Supreme Court of the United States, the decisions are almost innumerable. It would be impossible to attempt to refer to all of them. We will refer briefly to but two cases.

In the 91st U. S., on page 37, is the case of *Brown et al. vs. Piper*. The syllabus is as follows: "The application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent laws, is not the subject of a patent. Evidence of what is old and in general use at the time of an alleged invention is admissible in actions at law under the general issue, and in equity cases, without any averment in the answer touching the same. The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country."

Again, in the case of *Penn. Railroad vs. Locomotive Truck Company*, found in the 110th U. S., on page 494, in the opinion the court says: "It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated." Citing a number of authorities upon this question.

We think those cases come very close to this case. What this patent did was to combine the socket, which was in common use and known by everybody, to a patented rib sewer pipe, by a device no other or different use from what it had been and a common thing. We think it required no inventive ability after at least the invention that had been formerly patented.

We have a case decided by our own Supreme Court in the 11th Ohio, beginning on page 462. In the opinion on page 466 the judge in announcing the opinion sums up under several different heads the conditions where it has been held that an article or machine is not patentable, among them "First. A patent will be void if the thing patented had been in use or had been described anterior to the supposed discovery. Second. If it include things both new and old." Now, taking the latter, we think this patent does include probably two old things, or rather it includes the patented article and the thing in common use.

The reasoning given in the opinion by the Supreme Court in the case just referred to, for declaring the patents void in that case, would apply very closely to the case we are now considering. We are unable to see wherein the patentee of this sewer pipe invented anything, either new or patentable, and for that reason the patent is void. It follows from this that there was no consideration for the transfer of the notes and mortgage to Charles, and if they were unpaid he should be required to return them.

There is another defense urged to which we desire to make reference. That is, that there was a subsequent contract made by which Charles purchased this patent back. It is impossible in this case where we touch the vital parts of it to reconcile the testimony of Charles and Walker. The court must, in order to determine where the probability of truth is, simply look to the other facts and circumstances in determining that question and accept the one that they think is the better fortified.

There is no question raised but what Walker had entered into an agreement with the representatives of the proposed sewer pipe combination to sell this patent to them for \$32,000, provided Charles would put his company into the combination. After the entering into that contract Mr. Seiberling met Charles for the purpose of arranging with Charles to enter into this combination, and at this meeting

Charles learned of the sale by Walker to the proposed combination.

Walker says that after that Charles came to him and he learned that Charles knew of this agreement to sell to the combination, and that Charles wanted the patent back. He says that after some discussions of the matter and when he learned that Charles was unwilling for him to carry out this sale to the combination, but insisted that he, Charles, could make a better sale for himself if he owned the patent, that he and Charles entered into an agreement by which Charles purchased the patent from him, agreeing to pay him therefor the sum of \$30,000. Charles says that he and Walker did meet and that he tried to secure an option from Walker to purchase this patent right, but Walker refused to give him an option. This is the testimony in short of the two parties.

Now, it is admitted that about this time Charles entered into an agreement with Mr. Seiberling by which he agreed to sell to Mr. Seiberling, the representative of the proposed combination, this patent for \$32,000 and some other rights, and that this verbal contract was afterwards written out but never executed for the reason that Walker would not have anything to do with it.

From Charles' testimony we have him proposing to enter into a contract with Mr. Seiberling for the sale of a patent right which he did not own and upon which he was refused an option. We do not think he would have done this. We think the transaction with Mr. Seiberling tends very strongly to support the contention of Walker that Charles had entered into an agreement to purchase this patent right.

There is some dispute about when this occurrence took place and what occurred, but the fact that such a contract was drawn is not disputed. We think that the weight of the evidence in regard to that sale is with Walker. There may be a question as to whether or not this court has anything to do with that part of this transaction for the reason that the transaction was simply a contract to sell a certain article to

one party for a certain consideration, and the party refusing to comply with this contract, the action would be an action at law for damages and in no way connected with this equitable action in regard to the return of the property wrongfully obtained. We have some doubts as to whether we have any right to found this judgment on that claim. The question was not raised in the trial.

There is another question that we might refer to. It is claimed on the part of the plaintiff that because the sale of this patent right was a sale for an illegal purpose, and that purpose was not carried out, therefore the consideration passing in that transaction can be recovered.

It is claimed on the part of the defendant that because of this illegal transaction that a court of equity will leave the parties where they are and for that reason Walker cannot recover. The sale of this patent right was entirely legal. There was nothing wrong about it.

The court is not in doubt but what Charles was holding out the inducement that this company would take the patent and that Walker expected to sell the patent to them. The expectation that Walker would sell the patent to a combination which would use it for an illegal purpose would not make the sale of the patent between Charles and Walker illegal. It would not have been an illegal sale for Walker to have sold this patent to the combination of sewer pipe manufacturers. The illegality would only arise when the combination attempted to use the patent as a cloak to avoid the Sherman Anti-trust Law.

For these reasons we think the sale between Charles and Walker was not illegal, and that the contentions of both the plaintiff and the defendant on the grounds of illegality of the contract are not well taken.

We call counsel's attention to a discussion of this proposition in 9 Cyc., page 550, and the cases there cited.

We find that this patent was void, and therefore there was no consideration paid for it, and further that the notes and mortgage securing the same should be ordered returned by

Charles to Walker; and we further find that Walker and Charles entered into an agreement by which Charles purchased this patent back from Walker.

As the notes transferred by Walker to Charles had been paid by the payee and mortgagee, it follows that the court cannot now order the return of these notes and mortgage by Charles to Walker, and that the judgment can only be entered for the amount of these notes with their interest.

Exceptions are noted for the defendants, and if they file a motion for a new trial it is overruled and exceptions noted.

We do not think that the testimony supports any of the other claims of plaintiff.

Certificate.

STATE OF OHIO,

Jefferson County, ss:

Harriet G. Thatcher, being first duly sworn, deposes and says that she is the official stenographer of the Court of Appeals of the Seventh Appellate District of the State of Ohio, and that the foregoing is a true and correct copy of the opinion rendered by said court in the above case.

HARRIET G. THATCHER.

Sworn to and subscribed in my presence this 28th day of September, 1915.

[SEAL.]

CHARLES A. VAIL,

Notary Public.

"Article IV of the Constitution of Ohio.

"SECTION 1. The judicial power of the State is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

"SEC. 2. * * * It (Supreme Court) shall

have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, prohibition and *procedendo*, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this State, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * * IN CASES OF PUBLIC OR GREAT GENERAL INTEREST THE SUPREME COURT MAY, WITHIN SUCH LIMITATION OF TIME AS MAY BE PRESCRIBED BY LAW, DIRECT ANY COURT OF APPEALS TO CERTIFY ITS RECORD TO THE SUPREME COURT, AND MAY REVIEW AND AFFIRM, MODIFY, OR REVERSE THE JUDGMENT OF THE COURT OF APPEALS. * * *

SEC. 6. * * * The courts of appeals shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, prohibition, and *procedendo*, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, AND JUDGMENTS OF THE COURTS OF APPEALS SHALL BE FINAL IN ALL CASES, EXCEPT CASES INVOLVING QUESTIONS ARISING UNDER THE CONSTITUTION OF THE UNITED STATES OR OF THIS STATE, CASES OF FELONY, CASES OF WHICH IT HAS ORIGINAL JURISDICTION, and *cases of public or great general interest in which the Supreme Court may direct any court of appeals to certify its record to that court.*" * * *

The law governing the review of cases in the Supreme Court of Ohio has been announced October 7, 1913, by the said Supreme Court in the case of *The City of Akron vs. Roth*, 88 Ohio State, page 456. The syllabus of which is as follows:

"1. In determining the manner in which the exercise of the authority of this court to review judgments of the court of appeals in 'cases of public or great general interest' under the constitutional amendments of 1912 shall be invoked conclusive

effect should be given to the following provisions of the fourth article which relate especially to that subject: 'In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review, and affirm, modify, or reverse the judgment of the Court of Appeals;' * * *

"3. As to cases brought into the Court of Appeals after the first day of January, a proceeding to obtain a review by this court of a judgment of the Court of Appeals in a case of public or great general interest, and not within our jurisdiction for any other reason, must be instituted by an application for an order of this court directing the Court of Appeals to certify its record in the case to this court, such application to be made by motion showing from the record (a) that the case is of public or great general interest, and (b) that error has probably intervened; notice of such motion to be given in accordance with the general rule.

"4. No limitation as to the time of making such application having been prescribed by law, a limitation of seventy days from the date of such judgments in cases of public or great general interest as the Court of Appeals may hereafter render is hereby prescribed, and in cases of that character in which the Court of Appeals has already rendered final judgment since said first day of January, including the cases in which the motions now under consideration are filed, applications may be made at any time before the first day of January, 1914."

Frank E. McKean, Clerk; Seba H. Miller, Chief Deputy.

STATE OF OHIO.

Clerk of Supreme Court.

COLUMBUS, Sept. 16, 1915.

Mr. E. E. Erskine, Attorney-at-Law, Steubenville, Ohio.

DEAR SIR: I have your favor of the 15th inst., requesting certificate to the effect that no motion has been filed in this court for an order directing the court of appeals to certify up the record in the case of Walker B. Stratton *vs.* Charles M. Stratton *et al.*, in which you state judgment was rendered in the Court of Appeals of the Seventh Appellate District of Ohio at the May term, 1915.

After carefully consulting the records of this office we do not find that this case has been brought into this court between the judgment of the court of appeals as above referred to and the present date.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 16th day of September, A. D. 1915.

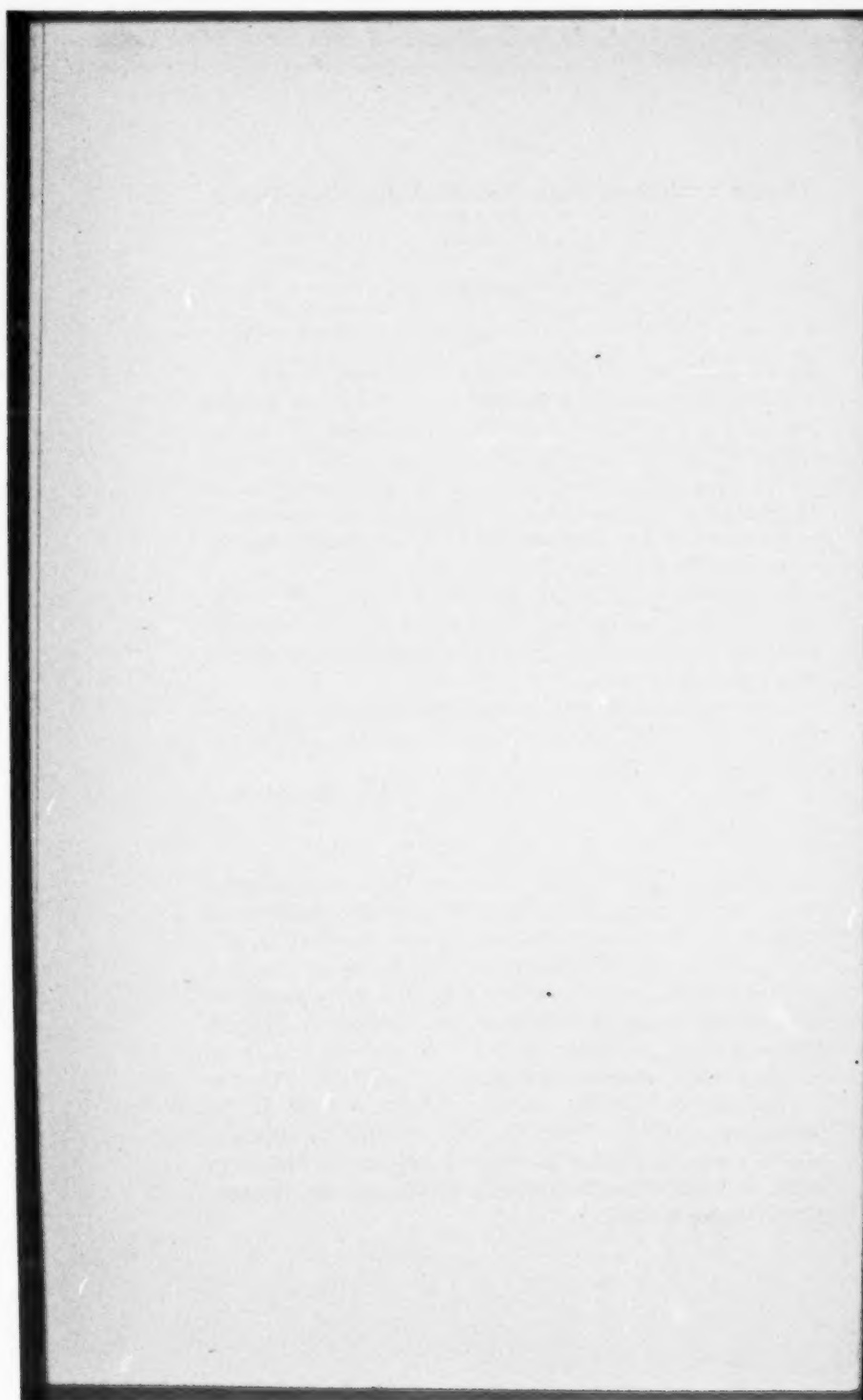
[SEAL.]

FRANK E. MCKEAN, *Clerk.*

F. E. M.* C.

[Endorsed:] 618/24,901. Supreme Court of the United States, October term, 1915. No. 618. Walker B. Stratton, plaintiff, *vs.* Charles M. Stratton, Harper E. Stratton, and The Stratton Fire Clay Company, defendants. Motions to dismiss writ of error or to affirm judgment or to transfer to the summary docket and for damages. Emmett E. Erskine, attorney-at-law, Steubenville, Ohio. C. A. Vail and D. A. Hollingsworth, attorneys for plaintiff Walker B. Stratton.

[Endorsed:] File No. 24,901. Supreme Court U. S., October term, 1915. Term No. 618. Charles M. Stratton, pl'ff in error, *vs.* Walker B. Stratton. Motion to dismiss or affirm or transfer to the summary docket, and for damages. Filed October 4, 1915.



Office Supreme Court, U. S.

FILED

OCT 23 1915

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 618.

CHARLES M. STRATTON, PLAINTIFF IN ERROR.

VS.

WALKER B. STRATTON, DEFENDANT *in* ERROR.

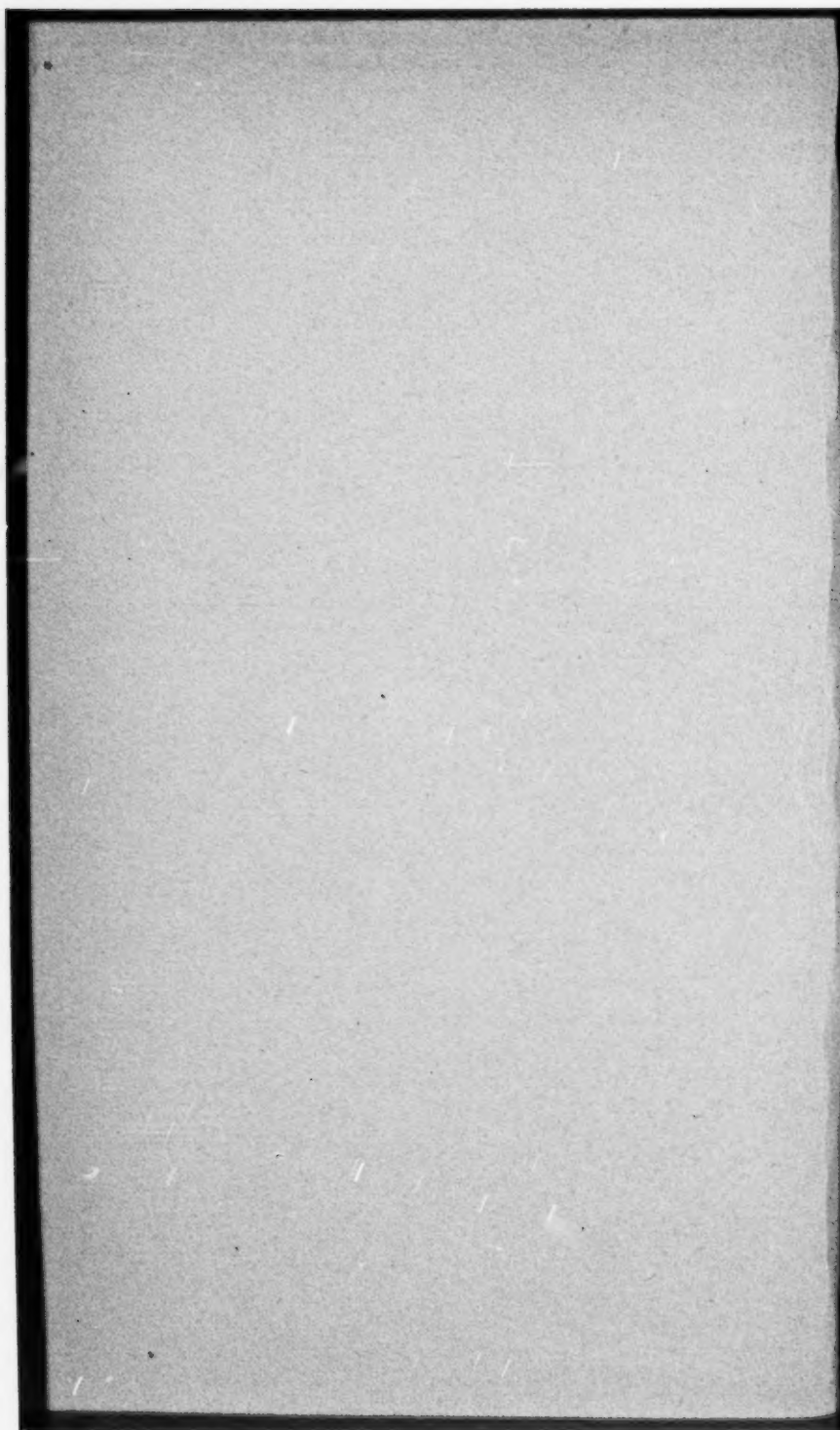
**BRIEF FOR PLAINTIFF IN ERROR ON
MOTION TO DISMISS WRIT OF ERROR.**

DAVID M. GRUBER,

ADDISON C. LEWIS,

Attorneys for Plaintiff in Error.

(24,901.)



INDEX.

	Page
Argument	13
Authorities cited	1
Facts	3
Points and Authorities	9

AUTHORITIES CITED.

Brief of Defendant in Error	5-8, 13-17
Chapman vs. Goodnow, 123, U. S., 541	12
City of Akron vs. Roth, 88 O. S., 457, 465....	10
Constitution of Ohio, Sec. 2, 6, Art. IV.	9-10
Illinois Central Railroad Company vs. Mc- Kendree, 203, U. S., 514	12
Opinion Court of Appeals	12
United States vs. American Bell Telephone Company, 128 U. S., 315	12



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 618.

CHARLES M. STRATTON, PLAINTIFF IN ERROR.

VS.

WALKER B. STRATTON, DEFENDANT IN ERROR.

In Error to the Court of Appeals of the Seventh
Appellate District of the State of Ohio.

**BRIEF FOR PLAINTIFF IN ERROR ON
MOTION TO DISMISS WRIT OF ERROR.**

FACTS.

This was a suit in equity, brought in the Common Pleas Court of Jefferson county, Ohio, on the 5th day of April, 1913, by defendant in error as plaintiff, against plaintiff in error and others as defendants.

In his amended petition defendant in error complains that plaintiff in error, being the owner of a patent for the manufacture of sewer pipe, sold the same to him for \$30,000.00; that The Stratton Fire Clay

Company, of which plaintiff in error was President, had been a member of a combination of sewer pipe manufacturers, formed for the purpose of fixing prices and controlling the sewer pipe trade in this country; that said combination had been dissolved by a Federal Court as being in violation of the Sherman Anti-Trust Law; that to induce defendant in error to buy said patent, and as a part of the contract of sale, plaintiff in error agreed that he and The Stratton Fire Clay Company would join with a combination known as The Eastern Sewer Pipe Manufacturers to manufacture and fix prices under said patent, and that they would pay a large rental or royalty to defendant in error, or buy the patent at a large price; that relying on this agreement defendant in error (who had long been a manufacturer of sewer pipe) purchased the patent.

He further complains that although said combination of manufacturers was thereafter willing to enter into an agreement to pay a large royalty for the use of the patent, or to buy it for \$32,000.00, for the purposes aforesaid, provided The Stratton Fire Clay Company would join with them, plaintiff in error "wrongfully and fraudulently" refused to carry out his said contract, and that he and The Stratton Fire Clay Company refused to enter into said agreement with the other manufacturers.

He sets out in his amended petition the written contract of sale which plaintiff in error signed at the time the transaction was consummated, but avers that by mistake and oversight, "as well as by the mistake or fraud" of the plaintiff in error, said written contract did not state the actual agreement between them.

He avers that about March, 1910, plaintiff in error agreed to return the purchase price of \$30,000.00 for said patent, but that in 1913, when defendant in error offered to transfer said patent to plaintiff in error, the latter refused to receive the same or to pay \$30,000.00 therefor; that thereafter

plaintiff in error took an option to buy the patent for \$25,000.00, but allowed the option to expire (*See Brief of Defendant in Error*, 4-18).

By an amendment to his amended petition defendant in error averred that said patent was invalid; that the invention as claimed and specified in the petition issued to plaintiff in error is covered in certain patents theretofore issued to A. Newkumet and N. U. Walker; that it is neither new, valid, nor of any value (*Ibid.* 26-28.)

Wherefore defendant in error prays that the sale and transfer of the Letters Patent from plaintiff in error to him be declared fraudulent and void; that the same be cancelled and held for naught; that plaintiff in error be ordered to return to defendant in error the mortgage notes of The Stratton Fire Clay Company and others, which he had transferred in payment of the consideration for said patent; that the equity of redemption of The Stratton Fire Clay Company in the mortgaged property be foreclosed; that defendant in error be awarded judgment against the defendants, and each of them, for the sum of \$30,000.00, as evidenced by said notes, with interest; that said written contract be reformed; that any compensation to which defendant in error might in equity be entitled should be decreed to him, and for such other relief as equity and good conscience require in the premises (*Ibid.*, 18).

For answer plaintiff in error admits that he was President of The Stratton Fire Clay Company; that defendant in error owned the notes and mortgage which were transferred to plaintiff in error in purchase of the latter's patent; that for several years prior to the date of said purchase there existed a combination of manufacturers of sewer pipe in the United States; that a suit was brought against said association in a Federal Court for the purpose of dissolving it, as being in violation of the Sherman Anti-Trust Law; that the association was so dissolved, and re-

strained from transacting business, as it had theretofore been doing; that defendant in error purchased from plaintiff in error the latter's patent for the manufacture of sewer pipe for the sum of \$30,000.00, and that plaintiff in error refuses to return the notes given him as consideration, or to pay the amounts thereof; that The Stratton Fire Clay Company was not willing to enter into said agreement for the use of said patent and the manufacture of sewer pipe thereunder, or to pay royalty for the pipe manufactured under said patent, or to buy said patent at the price of \$32,000.00; that at the time defendant in error purchased said patent he and plaintiff in error entered into a signed and written contract purporting to show the agreement made by them on that occasion; that after said purchase defendant in error gave plaintiff in error an option for the re-purchase of said patent in January, 1913, as set out in said amended petition; that said option was never exercised by plaintiff in error; and he admitted certain other immaterial allegations.

Further answering, plaintiff in error denied all and singular the allegations of said amended petition, and averred that the written contract first set out in said amended petition was the contract entered into by plaintiff in error with defendant in error, and that prior to the commencement of said suit the notes which were transferred to plaintiff in error in payment for said patent were paid off by the makers (*Ibid* 23-25).

In his answer to the amendment to said petition of defendant in error, plaintiff in error admitted that sewer pipe without ribs but with sockets had been manufactured, sold and used for — years, but denied all and singular the other allegations contained in said amendment (*Ibid*, 29).

For his second defense plaintiff in error further answered and said that the patent issued to N. U. Walker was not a useful invention; that its design and con-

struction rendered its manufacture impracticable, and that for these and other reasons said patent was invalid (*Ibid*, 29, 30).

For his third defense plaintiff in error averred that defendant in error was barred and estopped from seeking relief in a Court of Equity because the contract of sale which defendant in error claimed to be the true contract of sale between himself and plaintiff in error, and of the alleged breach whereof defendant in error complained, contained an agreement in violation of the Sherman Anti-trust law, and that he had no right in a Court of Equity with such grievance as he alleged (*Ibid*, 30, 31).

By his reply thereto defendant in error made a general denial of the matters affirmatively set out in the answer of plaintiff in error to the amended petition, and in the answer to the amendment to said amended petition, thereby denying, among other things, that the contract upon which he relied, and for the breach of which he sought redress, was a contract or agreement in violation of the Anti-trust law (*Ibid*, 31).

On the issues thereby raised and submitted the Court made the following findings:

(a)

That the written contract of sale between plaintiff in error and defendant in error was not, by reason of either fraud or mistake, different from the contract actually signed by the parties.

(b)

That the contract signed by the parties was not induced or caused to be made by false and fraudulent representations of plaintiff in error.

(c)

That by reason of the invalidity of said Letters Patent there was no valuable consideration

for the transfer of the notes and mortgage with which defendant in error paid for said patent.
(*Ibid*, 61. 63).

(d)

That by reason of plaintiff in error having collected the amount due on said notes and mortgage the same could not be ordered returned, and that therefore there was due from plaintiff in error to defendant in error the sum of \$30,000.00, with interest.

(*Ibid*, 45-47).

Whereupon the Court rendered judgment in favor of defendant in error, and against plaintiff in error, in the sum of \$34,100.00, and costs (*Ibid*, 47).

Thereupon plaintiff in error filed his motion to set aside the findings and decision of the Court and for a new trial, which was overruled, and plaintiff in error took exception thereto.

A Bill of Exceptions was duly prepared, filed, allowed and signed. The assignment of errors by plaintiff in error was duly prepared and filed (*Ibid*, 51).

A supersedeas bond was given by plaintiff in error, approved by the Presiding Judge of said Court of Appeals, and filed.

The petition of plaintiff in error for a Writ of Error was duly allowed by said Presiding Judge, and said Writ of Error from this Court to said Court of Appeals was duly issued and filed, and a proper transcript was accordingly prepared and transmitted to this Court, and all proceedings requisite in the premises were duly had.

POINTS AND AUTHORITIES.

(a)

The Court to which the Writ of Error issued from this Court is the highest Court of the State of Ohio having jurisdiction of this cause.

"Sec. 6. The State shall be divided into Appellate Districts * * , The Courts of Appeals shall have original jurisdiction in Quo Warranto, Mandamus, Habeas Corpus, Prohibition, and Procedendo, and Appellate jurisdiction in the trial of Chancery cases, and to review, affirm, modify, or reverse the judgment of the Courts of Common Pleas, Superior Courts, and other Courts of record within the District * * , and judgments of the Courts of Appeals shall be final in all cases, except cases involving questions arising under the Constitution of the United States, or of this State, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the Supreme Court may direct any Court of Appeals to certify its record to that Court."

Sec. 6, Art. IV. of the Constitution of the State of Ohio, adopted September 3, 1912.

"It (the Supreme Court) shall have original jurisdiction in Quo Warranto, Mandamus, Habeas Corpus, Prohibition, and Procedendo, and Appellate jurisdiction in all cases involving questions arising under the Constitution of the United States, or of this State, in cases of felony, on leave first obtained, and in cases which originate in the Courts of Appeal, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * * In cases of public or great general interest the Supreme Court may, within

such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals."

Sec. 2, Art. IV., Constitution of Ohio, adopted September 3, 1912.

Clearly this cause does not belong to any of the excepted classes of cases specified in the above provision of the State Constitution.

(b)

The question of whether a case is of public or great general interest must be determined from the record. Nowhere in the record is there a single circumstance indicating or suggesting that there is public or great general interest in any issue involved. To make it reviewable in the Supreme Court of Ohio the record must show it to be a case of public or great general interest.

The City of Akron vs. Roth, 88 O. S., 457.

"Authority to review causes of public interest is not embraced within the general ground of our jurisdiction. It is conferred as an authority to be exercised at our discretion, the authority to review to be preceded by our order to the Court of Appeals to certify its record to us."

The City of Akron vs. Roth, 88 O. S. 465.

The contract of sale which defendant in error set up in his amended petition and claimed to be the true contract between himself and plaintiff in error, contained an unlawful agreement, that is to say, it was a contract clearly in violation of the Sherman Anti-trust law, and although plaintiff in error denied that such was the true contract, and proved to the satisfaction of the Court that the contract which was

actually made and signed between the parties contained no agreement on his part to enter into a combination for manufacturing pipe under said patent and fixing the prices thereof, yet despite the fact that defendant in error thus came into a Court of Equity with confessedly unclean hands he was granted the relief prayed for, on the ground that the patent was invalid, and therefore worthless. We claim that his complaint was based on a ground offensive to equity, and that the Court of Appeals should have refused to grant him any redress (*Brief of Defendant in Error*, 5, 11, 15, 23, 30, 31, 46).

By his answer to said amended petition, and to defendant in error's amendment to his said amended petition, plaintiff in error denied that he made any such agreement, and pleaded that defendant in error was barred and estopped by these allegations in his amended petition from seeking relief. In other words, defendant in error alleged that plaintiff in error had entered into an agreement with him in violation of the Sherman Anti-trust law, and complained that plaintiff in error refused to carry out the unlawful agreement (*Ibid*, 23, 30, 31). This alleged agreement being in violation of the Anti-Trust statute, the Court below should have refused to grant such a complainant any relief. The Court of Appeals, however, not only found that plaintiff in error had not entered into such an agreement with defendant in error but held in effect that the agreement was not in violation of the statute in question, and that therefore defendant in error was not barred or estopped from seeking relief (*Ibid* 46). Here certainly arises a Federal question, decided adversely to plaintiff in error, for the Court should have held that by reason of his alleging such an unlawful agreement between himself and plaintiff in error, and by seeking relief on the ground that such alleged unlawful agreement was not carried out by plaintiff in error, complainant had no right to redress in a court of equity.

(d)

The Appellate Court held the patent right sold by plaintiff in error to defendant in error to be invalid, and the judgment of the Court was based on that finding. (*See Brief of Defendant in Error*, 46.) Here was another distinct Federal question, decided to the prejudice of plaintiff in error.

"We are unable to see wherein the patentee of this sewer pipe invented anything either new or patentable, and for that reason the patent is void. *It follows from this that there was no consideration for the transfer of the notes and mortgage to Charles*, and if they were unpaid he should be required to return them."

Opinion of Court of Appeals.

See Brief of Defendant in Error, 61.

"We find that this patent was void and therefore there was no consideration for it, * * * *"

Ibid, 63.

See also United States vs. American Bell Telephone Company, 128 U. S., 315.

"If a Federal question is clearly presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Rev. Stat. Sec. 709, as if it had been specifically referred to, and the right directly refused."

Chapman vs. Goodnow, 123 U. S., 541.

The Federal questions above-stated were specified in the assignment of errors (*Ibid* 51, 52, 53), and were recognized and admitted by the Presiding Judge in his allowance of the Writ of Error in this case.

See Transcript filed by plaintiff in error. Illinois Central Railroad Company, vs. McKendree, 203 U. S., 514.

ARGUMENT.

It is claimed by defendant in error that this Court has no right to consider this case because it is not brought here from the highest State Court having jurisdiction of it.

It is a suit in equity, commenced and tried in the Common Pleas Court, and thence taken by appeal to the Court of Appeals, where it was finally tried and disposed of. Under the Constitution of the State of Ohio there can be no possible question but that the Court of Appeals is the Court of last resort for the determination of this cause, unless it is a case of public or great general interest. It is distinctly and manifestly a case in which only the parties to it were and are concerned. It is based on an alleged breach of a private contract between plaintiff in error and defendant in error exclusively. In no relation or aspect does it concern or interest the public.

Whether or not a particular case is of public or great general interest must appear from the record, as the Supreme Court of Ohio itself has recently held.

The whole record being absolutely devoid of any fact or circumstance tending to indicate or suggesting the enlistment of public or great general interest, can it be claimed that it was necessary that plaintiff in error should make a vain and useless application to the Supreme Court of the State on a mere pretense? That plaintiff in error did not submit such an audacious claim to the Supreme Court of the State is shown by the Certificate of the Clerk of that Court, as kindly furnished by defendant in error. (*See Brief of Defendant in Error, 67*).

Further, defendant in error contends that no Federal question is involved in this case.

On the contrary, the contract upon which defend-

ant in error sued, and from which he sought to obtain relief for an alleged breach thereof by plaintiff in error, was a contract for the sale of a certain patent, and one of his grievances is the alleged invalidity of that patent. His other grievance is that plaintiff in error, as a part of the contract of sale, entered into an agreement with him for the use of said patent, in violation of the Sherman Anti-trust law, and then refused to carry out the unlawful agreement.

On the issue as to the invalidity of the patent the Court of Appeals decided in favor of defendant in error, and held that the patent was therefore of no value, and that defendant in error should recover the purchase money paid by him.

By that decision, an authority, right and title granted to plaintiff in error under the laws of the United States are annulled, and rendered of no value. As a result every manufacturer of sewer pipe is invited to use and treat as his own, property acquired by plaintiff in error from the Federal Government. Under cover of that decision the State Court takes from plaintiff in error, without compensation, upward of \$30,000.00. This it does, and we are told that there is no appeal and no right of review in the courts of the government that granted him the right, title and authority thereby destroyed. If it be within the province of the State Court to render such a decision it would seem to follow as a matter of unquestionable right that the person upon whom so great a loss is inflicted should have recourse to and a hearing in the court of the government which granted him its Letters Patent.

To hold otherwise would seem to recognize the right of a state court to ignore and hold for naught the authority and solemn grant of the federal government.

In this case is exhibited the extraordinary spectacle of a suitor in equity complaining to the court that the defendant, the plaintiff in error here, had failed

to carry out an unlawful agreement with him, and that as a result he was prevented from realizing illicit gain. In the statement of his grievance he declares in his amended petition that he was induced to purchase from plaintiff in error a patent for the manufacture of sewer pipe by the fraudulent promise and agreement of the latter that he, plaintiff in error, would join with a combination of manufacturers for the purpose of manufacturing sewer pipe under said patent, and of fixing the prices and controlling the out-put and trade, and that they would pay defendant in error a certain royalty for the right to manufacture under such patent.

He further complains that plaintiff in error refused to carry out this unlawful agreement with him, to his great damage.

The Court of Appeals found that plaintiff in error was guilty of no fraud, and that he had made no such agreement as defendant in error claimed. In other words, the court found that the true contract was the written agreement actually signed by them.

The contract which defendant in error claimed was the true contract entered into by him and plaintiff in error contained the following provision:

"Said first party (Charles Stratton) agrees that he and The Eastern Fire Clay Company will join with what is known as The Eastern Sewer Pipe Manufacturers in an association or combination to manufacture and fix prices of sewer pipe under the above described patent, and he further agrees that The Eastern Sewer Pipe Manufacturers will have the right to fix prices and to regulate the output of all sewer pipe made under said patent, with the following reservations and conditions." (*Ibid*, 13).

The contract which the parties actually signed, and which the Court of Appeals found to be the deliberate

and real contract between the parties, contained the following provision:

"The said party of the first part (Charles M. Stratton) reserves the right to manufacture, or cause to be manufactured, the said patent pipe at The Stratton Fire Clay Company's plant, The Ohio River Sewer Pipe Company's plant, and The Great Northern Sewer Pipe Company's plant, or any sewer pipe factories that the Stratton Brothers may erect in the future, without restrictions as to the prices that he may desire to sell the goods, or the quantity that he may desire to manufacture." (*Ibid*, 12).

Thus it clearly appears that instead of making the agreement which the defendant in error alleged, an agreement clearly and boldly in violation of the Sherman Anti-trust law, plaintiff in error not only reserved to himself the right of independent manufacture, without restriction as to price or out-put, but reserved the right to manufacture pipe under the patent without pay to defendant in error.

Our contention is that the false contract set up and insisted upon by defendant in error was unlawful under the laws of the United States; that he came into a court of equity with unclean hands and unrepentant; that the court should have found his pretended contract to be in violation of the Anti-trust law, and should have denied him redress for his alleged grievance. While denying the agreement alleged by defendant in error, plaintiff in error, in his third defense, claimed that such alleged agreement was unlawful, and that the declarations or allegations of defendant in error in respect thereof barred and estopped him from seeking relief from his own unlawful acts. (*Ibid*, 30, 31.)

The Court of Appeals wholly ignored this issue, or rather wholly misconceived or misapprehended it.

For the Court refers to the plea of plaintiff in error in this connection as though plaintiff in error were himself alleging that the contract entered into between him and defendant in error was an unlawful contract! We confidently submit to this Court that in view of the answer of plaintiff in error to the amended petition, and in view of the express and distinct plea of estoppel contained in his third defense to the amendment of defendant in error to the amended petition, there was no just excuse for either disregarding this issue or misunderstanding it.

We claim that the Court of Appeals, in holding invalid the patent involved in this case, did so in disregard of the strong preponderance of the evidence; and while we realize that this Court will not on a motion to dismiss consider the weight of evidence we respectfully insist that our client is entitled to a review in this Court for the reasons we have stated.

Respectfully submitted,
DAVID M. GRUBER,
ADDISON C. LEWIS.

STRATTON v. STRATTON.

ERROR TO THE COURT OF APPEALS OF THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO.

No. 618. Motion to dismiss or affirm submitted October 25, 1915.—
Decided November 8, 1915.

A judgment of an intermediate appellate state court is not a final judgment of the state court of last resort within the meaning of § 237, Judicial Code, if the highest court of the State has a discretionary power to review which has not been invoked and refused.

The usual practice in the various States where discretionary power to review exists in the highest court of the State is to invoke the exercise of such discretion in order that upon the refusal to do so there may be no question concerning the right to review in this court.

Appeal from a judgment of the Court of Appeals of Ohio dismissed on the ground that under the constitution and laws of Ohio the Supreme Court of the State had a discretionary power of review which had not been invoked and refused.

THE facts, which involve the jurisdiction of this court to review the judgment of a state court under § 237, Judicial Code, are stated in the opinion.

Mr. D. A. Hollingsworth, Mr. C. A. Vail and Mr. E. E. Erskine, for defendant in error in support of the motion to dismiss or affirm.

Mr. Addison C. Lewis and Mr. David M. Gruber for plaintiff in error in opposition to the motion.

Memorandum opinion by MR. CHIEF JUSTICE WHITE,
by direction of the court.

To reverse a judgment rendered by the Ohio Court of Appeals of the Seventh Appellate District on the ground of

Federal errors committed, this writ of error is prosecuted to that court. There is a motion to dismiss based on the ground that the court of last authority, the Supreme Court of the State, was the highest court in which a decision in the suit could be had. This rests not upon the contention that in all cases as a matter of right and of duty the Supreme Court was given authority to review the judgments and decrees of the Courts of Appeals, but upon the proposition that under the constitution and laws of Ohio the Supreme Court was vested with power to review in every case the judgments or decrees of the Courts of Appeals where in the exercise of its judgment the Supreme Court deemed them to be of such public or great general interest as to require review.

The premise upon which the proposition is based being undoubtedly accurate, indeed not disputable (Ohio Constitution, Art. IV, § 2; *City of Akron v. Roth*, 88 Ohio St. 457), we think the motion to dismiss must prevail. True, it is urged that under the Ohio law the jurisdiction of the Supreme Court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest—an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not, that is, by indulging in conjecture as to what would or would not have been the judgment of the Supreme Court of Ohio if it had been called upon to exert the discretion vested in it by state laws. When the significance of the proposition upon which the claim of jurisdiction is based is thus fixed, it is not open to contention, as it has long since been adversely disposed of. *Fisher v. Perkins*, 122 U. S. 522; *Mullen v. West. Un. Beef Co.*, 173 U. S. 116. Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various States where discretionary power

239 U. S.

Syllabus.

to review exists in the highest court of the State, to invoke the exercise of such discretion in order that upon the refusal to do so there might be no question concerning the right to review in this court. See *West. Un. Tel. Co. v. Crovo*, 220 U. S. 364; *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264; *St. Louis San Francisco Ry. v. Seale*, 229 U. S. 156.

Dismissed for want of jurisdiction.